

Before the
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In the matter of:

Distribution of the
1998 and 1999 Cable
Royalty Funds

Docket No.
2001-8 CARP CD 98-99

Room LM-414
Library of Congress
First and Independence Ave. S.E.
Washington, D.C. 20540

Monday,
April 28, 2003

The above-entitled matter came on for hearing,
pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE CURTIS E. Von KANN
THE HONORABLE JEFFREY S. GULIN
THE HONORABLE MICHAEL D. YOUNG

Chairman
Arbitrator
Arbitrator

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WASHINGTON, D.C. 20005-3701

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APPEARANCES:On Behalf of the Program Suppliers:

GREGORY OLANIRAN, ESQ
ROBERT L. ESKAY, ESQ
SARAH K. JOHNSON, ESQ
MICHAEL E. TUCCI, ESQ
Stinson Morrison Hecker, LLP
1150 18th Street, N.W.
Suite 800
Washington, D.C. 20036-3816
(202) 785-9100

On Behalf of the Joint Sports Claimants:

Counsel for the Office of the Commissioner of
Baseball

ROBERT ALAN GARRETT, ESQ
JAMES COOPER, ESQ
MICHELE T. DUNLOP, ESQ
RONALD A. SCHECHTER, ESQ
JULE SIGALL, ESQ
CHRISTOPHER WINTERS, ESQ
MICHELE WOODS, ESQ
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004-1206

THOMAS J. OSTERTAG
Senior Vice President & General Counsel
Office of the Commissioner of Baseball
245 Park Avenue
New York, New York 10167

Counsel for the National Basketball Association,
National Football League, and National Hockey
League

PHILIP R. HOCHBERG, ESQ
PIPER RUDNICK, ESQ
Verner, Liipfert, Bernhard, McPherson & Hand
901 Fifteenth Street, N.W.
Washington, D.C. 20005

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WASHINGTON, D.C. 20005-3701

On Behalf of the Joint Sports Claimants: (cont.)

Counsel for the National Collegiate Athletic
Association

RITCHIE THOMAS, ESQ

JUDITH JURIN SEMO, ESQ

Squire, Sanders & Dempsey, LLP

1201 Pennsylvania Avenue, N.W.

Washington, D.C. 20004

On Behalf of the Public Television Claimants:

TIMOTHY C. HESTER, ESQ

RONALD G. DOVE, ESQ

RUSSELL JESSE, ESQ

Covington & Burling

1201 Pennsylvania Avenue, N.W.

Washington, D.C., 20044-7566

PAUL GRECO, ESQ

Public Broadcasting Service

1320 Braddock Place

Alexandria, Virginia 22314

On Behalf of the American Society of Composers,
Authors and Publishers:

I. FRED KOENIGSBERG, ESQ

CAROL A. WITSCHER, ESQ

White & Case

1155 Avenue of the Americas

New York, New York 10036-2787

JAMES M. MCGIVERN, ESQ

SAMUEL MOSENKIS, ESQ

ASCAP

One Lincoln Plaza

New York, New York 10023

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On Behalf of BMI:

MICHAEL J. REMINGTON, ESQ
ADAM L. BREA, ESQ
JEFFREY J. LOPEZ, ESQ
PHILIP J. MAUSE, ESQ
Drinker, Biddle & Reath, LLP
1500 K Street, N.W.
Suite 1100
Washington, D.C. 20005

MARVIN J. BERENSON, ESQ
JOSEPH J. DiMONA, ESQ
MARC D. OSTROW, ESQ
Broadcast Music, Inc.
320 West 57th Street,
New York, New York 10019

On Behalf of SESAC, Inc:

JOHN C. BEITER, ESQ
Loeb & Loeb
45 Music Square West
Nashville, Tennessee 37203

PATRICK COLLINS, ESQ
SESAC, Inc.
55 Music Square East
Nashville, Tennessee 37023

On Behalf of National Public Radio:

NIKI KUCKES, ESQ
Baker Botts LLP
The Warner
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2400

NEAL A. JACKSON, ESQ
GREGORY LEWIS
National Public Radio
635 Massachusetts Avenue, N.W.
Washington, D.C. 20001

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WASHINGTON, D.C. 20005-3701

On Behalf of the Canadian Claimants Group:

L. KENDALL SATTERFIELD, ESQ
RICHARD M. VOLIN, ESQ
Finkelstein, Thompson & Loughran
1050 30th Street, N.W.
Washington, D.C. 20007
(202) 337-8000

On Behalf of the National Association of Broadcasters:

JOHN I. STEWART, ESQ
PARUL DESAI, ESQ
KAREN C. HERMAN, ESQ
VALERIE HINKO, ESQ
MICHAEL LAZARUS, ESQ
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 624-2926

HENRY L. BAUMANN, ESQ
BART STRINGHAM, ESQ
National Association of Broadcasters
1771 N Street, N.W.
Washington, D.C. 20036

Counsel For Devotional ClaimantsOn Behalf of the Devotional Claimants:

FRANK KOSZORUS, ESQ
Collier Shannon Rill & Scott
3050 K Street, N.W.
Washington, D.C. 20037

JAMES CANNING, ESQ
Our Own Performance Society
400 2nd Avenue, Ste., 22C
New York, New York 20007

RAUL GALAZ, ESQ
Independent Producers Group
2318 Sawgrass Ridge
San Antonio, Texas 78258

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On Behalf of Christian Broadcasting Network, Inc.; and
the Devotional Claimants:

BARRY H. GOTTFRIED, ESQ
CLIFFORD M. HARRINGTON, ESQ
ShawPittman
2300 N Street, N.W.
Washington, D.C. 20037

On Behalf of Coral Ridge Ministries Media, Inc.; Oral
Roberts Evangelistic Association:

GEORGE R. GRANGE, II, ESQ
KENNETH E. LIU, ESQ
Gammon & Grange, P.C.
8280 Greensboro Drive
Seventh Floor
McLean, Virginia 22102

On Behalf of KNLJ (New Life Evangelistic Center,
Inc.):

JOHN H. MIDLEN, JR, ESQ
Midlen Law Center
7618 Lynn
Chevy Chase, Maryland 20815

On Behalf of the Home Shopping Network, Inc.;
Independent Producers Group; Home
Shopping en Espanol and AST LLC; and Crystal Cathedral
Ministries, Inc.:

ARNOLD P. LUTZKER, ESQ
CARL H. SETTLEMEYER, ESQ
Lutzker & Lutzker
1000 Vermont Avenue, N.W.
Washington, D.C. 20005

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By Mr. Olaniran 652

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P-R-O-C-E-E-D-I-N-G-S

(9:34 a.m.)

JUDGE VON KANN: All right. Well, good morning, everyone. We are ready to begin Day 3 of the arbitration hearing in the matter of the Distribution of the 1998 and 1999 Cable Royalty Funds.

Before we get into testimony, a couple of administrative matters. Did people bring in today copies of the exhibit lists? Has everybody got those? Will the people pass them up to me if you have got yours done here? That would be grateful.

MR. OLANIRAN: We would have ours by the close of business today.

JUDGE VON KANN: All right. That will be fine, and I am assuming that you have given copies to others. I guess everybody would like one, right? Yes, one each.

And while we are in the handout department, do the parties other than JSC have their daily witness schedules yet? Would you hand those up to us as well?

MR. COOPER: In connection with that, we

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1 have a change in our schedule.

2 JUDGE VON KANN: All right. Well, let me
3 get these others first, and then we will find out
4 about that. Okay. I have the schedule here from Mr.
5 Stewart for next week, which is helpful.

6 If other parties have their schedules at
7 this point, fine, and if not, if they could get them
8 to us say by the time that we break at the end of this
9 week, to the extent that you know it. Is there an
10 issue on your scheduling?

11 MR. COOPER: I don't know if it is an
12 issue. It is sort of a change. On Wednesday, we are
13 going to have -- instead of having Commissioner Selig
14 in the morning, we are going to put him off until
15 later in the month to be determined.

16 JUDGE VON KANN: Okay.

17 MR. COOPER: And we will start Wednesday
18 morning with Michael Eagan in the morning, and then we
19 will have June Travis in the afternoon; or immediately
20 following Eagan.

21 JUDGE VON KANN: Eagan and Travis on
22 Wednesday?

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1 MR. COOPER: Right.

2 JUDGE VON KANN: Okay. And that will
3 leave Selig and one other cable operator?

4 MR. COOPER: Selig and Judy Allan.

5 JUDGE VON KANN: And do we have any more
6 of a feel yet for whether the May 29 and 30th may be
7 doable? Do we know about the Canadian witness, and
8 whether that is a doable date for Dr. Engle? But it
9 is beginning to look reasonably promising for the 29th
10 and 30th. You think that your people will be
11 available those days?

12 MR. COOPER: The 29th, our people are
13 available.

14 JUDGE VON KANN: So if this worked, you
15 would take Selig and Judy Allan on the 29th?

16 MR. COOPER: Right.

17 JUDGE VON KANN: So I guess the question
18 would be whether Dr. Engle could come on the 30th.
19 Okay. Any other preliminaries before we get started?

20 Oh, yes, we were asked by the Copyright
21 staff if at the end of the day people could clean up
22 a little bit your area, and pick up empty water

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1 bottles, and cups of coffee, and whatever, and throw
2 them away? I guess a complaint has been registered by
3 the cleaning staff, who were outraged at the notion of
4 cleaning or something like that. Okay. Anything
5 else? Okay. Mr. Cooper.

6 MR. COOPER: Dr. Crandall will be our next
7 witness.

8 Whereupon,

9 DR. ROBERT CRANDALL

10 was called as a witness, and having been first duly
11 sworn, was examined and testified as follows:

12 DIRECT EXAMINATION

13 BY MR. COOPER:

14 Q Good morning, Dr. Crandall. Could you
15 just give your name and your current employment?

16 A My name is Robert W. Crandall, and I am a
17 Senior Fellow at the Brookings Institution in
18 Washington.

19 Q And what are your responsibilities of the
20 Brookings Institution? What do you do there?

21 A Well, I do research on economic issues,
22 particularly as they pertain to specific industries

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1 and economic and social regulation.

2 Q Do you do any research that is relevant to
3 broadcasting, or cable, or telecommunications?

4 A I certainly have in the past. I am not
5 currently at this very moment.

6 Q Prior to Brookings what did you do?

7 A Well, I taught at the Massachusetts
8 Institute of Technology for 8 years, and I was in the
9 government for 2 years, on the Council on Wage and
10 Price Stability; and then I joined the Brookings
11 Institution in 1978.

12 Q Have you testified before in connection
13 with these cable or satellite arbitration royalty
14 proceedings?

15 A Yes, I have.

16 Q Can you just briefly summarize when you
17 have testified before?

18 A I will attempt to at least get most of
19 them. I testified in the '89 proceeding, and I
20 testified in the 1992 proceeding, both for JSC; and I
21 testified in the -- I think it is the '94 proceeding
22 in the satellite case that took place around 1996 for

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1 JSC.

2 And on one other occasion I think I
3 testified -- and Mr. Garrett can refresh my memory --
4 for the National Cable Television Association on an
5 inflation adjustment issue involving copyright.

6 Q And have you submitted written testimony
7 in connection with this proceeding?

8 A Yes, I have.

9 Q Okay. Voir Dire? Okay. Mr. Crandall,
10 could you just briefly summarize your testimony?

11 A Well, my testimony addresses the
12 methodology that the panel should use, the arbitration
13 panel should use, in allocating the royalty payments
14 under the compulsory license granted for imported
15 distant signals.

16 And suggest that the basis for doing so
17 ought to be based upon how a market would handle such
18 an allocation in the absence of a compulsory license.

19 Q And I think that discussion is on -- it
20 starts on page 6. Can you just explain why in your
21 view it makes sense for the panel to use a market
22 approach in valuing the claims here?

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1 A As I understand the reason for the
2 compulsory license was to save on transactions cost,
3 which would be very, very high, if there were
4 individual bargaining between copyright owners and
5 cable systems, and a compulsory license was inserted
6 in lieu of such bargaining.

7 And given that fact, it seems to me the
8 appropriate way to allocate the royalty payments made
9 under the compulsory license is in a way which
10 simulates that sort of transaction that is a
11 bargaining between copyright owners and cable system
12 owners.

13 Q Have either the copyright royalty tribunal
14 or the CARP in the past considered this question of
15 whether to use market valuation to your knowledge?

16 A Yes. In reading past decisions of the
17 CARP, it is clear that they have moved ever closer to
18 this position, focusing more and more intently on how
19 a market would allocate these royalties, and less upon
20 other issues.

21 Q If you turn to page 8 in your testimony,
22 Roman Two there is the beginning I believe of your

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1 discussion of the -- I'm sorry, I am one step behind.
2 On page 10, Roman 3, is your discussion of the board
3 survey. Can you just summarize your conclusions with
4 respect to the board survey?

5 A Well, it would be nice if we actually had
6 market transactions between copyright owners and cable
7 systems involving the signals in question, but first
8 we do not. And therefore we have to look to some
9 other way of simulating what these transactions would
10 look like.

11 And the best way to do it is simply to ask
12 the cable system owners, who would be the purchasers
13 of this programming from the copyright holders, how
14 they would allocate their funds in purchasing this
15 programming on the distant signals, and that is what
16 the board survey does.

17 Q And then -- well, are you familiar with
18 the CARP or the CRT's reliance in the past on the
19 board survey?

20 A Yes, I am. I have read or participated in
21 these hearings before and read their opinions, yes.

22 Q And particularly with respect to the 1990

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1 to 1992 CARP, did they have any criticisms of the --
2 or comments on the board survey?

3 A Well, first, it is clear that they relied
4 upon it very heavily. However, they did have a couple
5 of misgivings, one of which dealt with the fact that
6 it was not an actual reflection of purchases, but
7 rather of the attitudes of the cable purchasers.

8 And secondly that it ignored the supply
9 side of the market transactions, since obviously the
10 survey was canvassing the buyers.

11 Q And what is your assessment from your
12 perspective of those criticisms and the panel's
13 downward departure with respect to sports from the
14 Board's number?

15 A Well, first of all, there is no doubt that
16 a survey is a somewhat imprecise measure of how a
17 market would actually work out. It would be nice to
18 have actual market transactions, though even those are
19 subject to a large number of reporting errors.

20 But if you were to try to obtain how the
21 market would function, and try to obtain information
22 on how the market would function, surely the best

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1 source of information for those people making the
2 decisions and making the purchases.

3 And the fact that this is not a perfect
4 measure does not suggest necessarily that one ought to
5 subtract anything from the survey's total for any
6 particular class of claimants without further
7 evidence.

8 The fact that the survey captured the
9 cable owners' attitudes towards how they would spend
10 their money does not suggest that you ought to
11 discount the JSC claim and share that comes from the
12 board survey, thereby adding to one or more of the
13 other claimant's share, without other ancillary
14 evidence.

15 Secondly, on the supply side, there was no
16 evidence that I am aware of that the CARP cited that
17 would justify a departure based upon the supply side
18 for any particular claimant group. They simply said
19 that this was a reason for not relying in toto on the
20 board's survey.

21 But there was nothing cited that would
22 suggest that supply side considerations ought to

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1 detract from the JSC claimants as opposed to the NAB
2 claimants, as opposed to, say the Devotional
3 claimants, or the program supplier claimants.

4 Q With respect to the devotional claimants
5 which you just mentioned was there any discussion in
6 the CARP report about whether to depart because of
7 their marketplace conduct?

8 A Well, my recollection is that there was
9 language in discussing the Devotional case that
10 pointed out that the devotional claimants often paid
11 for carriage. They not only didn't get a positive
12 price, they actually got a negative price off of it
13 for getting carriage of their programs on these
14 signals.

15 Q Is that an example of the kind of seller's
16 conduct that might be relevant in assessing a board's
17 number?

18 A It certainly might be. I mean, it would
19 suggest that the NAB market in which they are eager to
20 have their programs carried, even if they get a zero
21 price, or even have to pay for it, that they would not
22 obtain much in the way of copyright royalties if as a

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1 matter of fact, they are willing to settle for
2 negative royalties.

3 MR. COOPER: Nothing further.

4 JUDGE VON KANN: Okay. Who are we leading
5 off with. or has that been resolved? Okay.

6 CROSS-EXAMINATION

7 BY MR. OLANIRAN:

8 Q Good morning. Dr. Crandall. I am Greg
9 Olaniran, counsel for Program Supplies. I just have
10 one or two questions. On page 7 of your testimony --
11 are you there?

12 A Yes, I am there.

13 Q You make a distinction between the
14 approach taken by the '89 CRT and the '90-'92 CRT with
15 respect to the application of the market valuation.
16 Are you with me?

17 A Yes, in paragraph 14, is what you are
18 referring to?

19 Q Yes, that's correct.

20 A Yes.

21 Q And there you go on to paragraph 15 to
22 conclude that the '89 CRT approach is more relevant in

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1 this proceeding. Do you want to explain that just a
2 little bit?

3 A Well, the question is what would this
4 market look like in the absence of compulsory
5 licensing of the programming, and would the
6 negotiations take place between the cable system
7 owners and the copyright holders directly, or would it
8 take place with those people assembling the copyright
9 product on the distant signals.

10 It seems to me that it is most likely to
11 take place between the cable system owners and the
12 copyright owners directly, and there was some
13 difference in the language between those two opinions,
14 though perhaps less than my language here might
15 suggest, because in the '90-'92 decision the CARP
16 panel went on to explain that there would be
17 negotiations between the cable systems and the
18 copyright owners.

19 But we don't know how that market would
20 organize itself. There surely would not be
21 negotiation between each cable system and each
22 individual copyright owner.

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1 There would probably be intermediaries of
2 some sort, people representing some group of copyright
3 owners.

4 Q All right. But your view is that it would
5 be more relevant in what the panel is trying to do
6 here to have direct negotiations between the cable
7 system operators and the copyright owners?

8 A Well, it would obviate some of the
9 complexities. I mean, the question is what would the
10 copyright owners supply, and under what terms, and how
11 much of it would the cable system owners take, and at
12 what prices.

13 So you are really focusing on the two
14 people who have something at stake here. They are
15 often intermediaries in between because of the need to
16 minimize transactions cost.

17 MR. OLANIRAN: That is all the questions
18 that I have. Thank you.

19 JUDGE VON KANN: Okay. Mr. Stewart.

20 BY MR. STEWART:

21 Q Good morning, Dr. Crandall. I am John
22 Stewart, and I am representing the Commercial

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1 Television claimants in this proceeding.

2 A Good morning.

3 Q We have talked before.

4 A Un-huh.

5 Q If you would turn to page 9 of your
6 statement, please. In paragraph 19 there, you
7 identify to attributes of sports programming that you
8 suggest makes sports programming uniquely valuable in
9 this cable distant signal marketplace; is that
10 correct?

11 A Yes.

12 Q And the first one is that because of the
13 fact that sports games telecasts are live and aren't
14 repeated often that there is an ephemeral value in
15 effect to those programs?

16 A I don't know about ephemeral. The fact is
17 that there is a substantial value to watching it live,
18 because watching it the second time after you know the
19 result is not quite the same experience.

20 Q And what is the point that you are making
21 in the second part of the paragraph, "distant signals
22 also provide a new source of live sports programming."

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1 Do you see that?

2 A Well, to the extent that the cable system
3 does not have access to cable networks now, local
4 television signals that have these specific teams or
5 events that are on distant signals, and it is indeed
6 a new increment to the menu of sports choices for the
7 local viewers.

8 Q And did you say to the extent that cable
9 subscribers do not have access to cable networks?

10 A That they do not have access to some of
11 these events that are on the distant signals. For
12 instance, ESPN may not carry the Cubs games that WGN
13 does carry. So this could be new programming to
14 people who don't have other ways of getting the Cubs'
15 program.

16 Q That is that the individual program or
17 individual game might be available only via that
18 distant signal?

19 A Yes.

20 Q And it is the case, however, that in this
21 time frame of 1998 to 1999 that there were exhibitions
22 of some games on the Fox Network. Are you familiar

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1 with that?

2 A Yes.

3 Q And with respect to those games, there
4 could be other sources available? That is,
5 specifically the local Fox affiliates who would be
6 carrying the same games as the distant Fox affiliates?

7 A There could be, but often, and especially
8 for football, the importation of the distant signal
9 would give you a different set of games than you got
10 from your local signal, something that people in
11 Washington recognize very much as being available from
12 the Baltimore signals, for instance.

13 Q But that is not true in the majority of
14 the cases is it?

15 A I don't know what you mean by majority.
16 For a majority of viewers, I don't know whether it is
17 true. I have not studied how often that takes place,
18 but often if they are shifted into a market of someone
19 else's sports franchise, then it would be true.

20 Q We had Mr. Tagliabue testifying, and he
21 testified that in some cases the distant Fox affiliate
22 is bringing in the same game as is on the local Fox

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1 affiliate.

2 A I am sure that's true. What I do not know
3 is as measured by some metric whether that constitutes
4 the majority or the minority of cases.

5 Q I think that Mr. Tagliabue's testimony
6 addressed that issue. What about regional sports
7 networks on cable? First of all, is that a phenomenon
8 that increased in any significant way between 1992 and
9 1998 that you are aware of?

10 A I suspect that it did, but I have not
11 looked at that carefully.

12 Q And are you familiar with regional sports
13 networks?

14 A Oh, sure.

15 Q And they provide substantial numbers of
16 games of regionally important teams; is that right?

17 A That's correct.

18 Q And those are not subject to the distant
19 signal and compulsory license, and are not part of
20 this distant signal proceeding that we are in today,
21 correct?

22 A Not typically.

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1 Q And to the extent that they, for example,
2 would be the principal source for a majority of the
3 games of the local team, or the regional team, they
4 would be a superior source to distant signals of those
5 regionally important games, correct?

6 A For those people who are fans of the local
7 team, but there are any number of people who might
8 want to watch other games, and it is spread out around
9 the Washington area, the sports bars that specialize
10 in Cleveland Brown's games, and New York Giants'
11 games, or whatever, and those people may pay or choose
12 to subscribe to cable just because those are available
13 on a distant signal.

14 Q I would like to discuss with you a
15 pragmatic or sort of pragmatic concrete perspective,
16 and the options that are available in the cable
17 marketplace. And I am handing you a document which
18 has been incorporated by reference by the Sports
19 claimants into the record. This was the testimony of
20 Paul Bortz in the prior proceeding.

21 JUDGE VON KANN: This was in Volume 2 of
22 the Joint Sports claim and case where there were

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1 various prior testimonies collected, I guess?

2 MR. STEWART: Yes, indeed.

3 JUDGE VON KANN: What tab is this under?
4 Do we have that tab number? Volume 2, Tab 2. Okay.

5 MR. COOPER: This is selected papers?

6 MR. STEWART: It is only part of it,
7 counsel. And I apologize for not having additional
8 copies, but I will provide additional copies for the
9 record.

10 JUDGE VON KANN: Here is one more. You
11 are not planning on marking this as an exhibit are
12 you?

13 MR. STEWART: Well, I wanted to ask the
14 panelists' view about whether I should do so.

15 JUDGE VON KANN: I don't think so. It is
16 in the record as some part of the JSC direct case, and
17 I don't think it is necessary.

18 MR. GARRETT: We are not going to identify
19 this as well.

20 JUDGE VON KANN: Okay. I don't think it
21 is necessary.

22 MR. STEWART: I frankly think or guess

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1 that I would prefer to have it marked in some way.

2 JUDGE VON KANN: All right.

3 MR. STEWART: And I am sorry not to have
4 brought additional copies.

5 JUDGE VON KANN: Then give me that one
6 back.

7 I guess we are being overly safe here, but I guess it
8 can't hurt.

9 MR. COOPER: Should we then be marking,
10 for example, all of the incorporated testimony that we
11 have? Should we be marking it as demonstratives?

12 JUDGE VON KANN: I think that the
13 distinction that is emerging is if there is specific
14 examination of a witness about it, so that the
15 transcript is going to show him flipping around at
16 something, then perhaps we should have that something.

17 But, no, not all this other stuff that you
18 are not examining people about.

19 MR. COOPER: Well, I am just wondering if
20 the same, or actually a more complete version of this
21 same thing is going to be one of the tabs, and he will
22 testify about part of it, and we may refer to it in

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1 our findings or proposed findings of fact.

2 JUDGE VON KANN: That's fine. It is in
3 the record.

4 JUDGE GULIN: Anything that has been
5 designated is in evidence subject to a conversation
6 that we are going to be having about that.

7 MR. COOPER: Right. I just didn't want
8 there to be any confusion about an exhibit marked, or
9 somebody might cite to this paragraph as in the demo
10 exhibit, or they might cite to it in the tab.

11 JUDGE GULIN: They would be well to cite
12 to it in the tab.

13 JUDGE VON KANN: Yes. Fine. I think the
14 distinction that I guess we are going to follow is
15 that if it is plopped in front of a witness and he is
16 interrogated about it, then to make the record crystal
17 clear, it would be good to have it, but only as to
18 those items that you do that with. So this becomes
19 NAB Demo Number 1.

20 (Whereupon, NAB Demo No. 1 was
21 marked for identification.)

22 BY MR. STEWART:

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1 Q Correct. Thank you. What I have done
2 here is to take the incorporated testimony of Paul
3 Bortz in the 1990 to 1992 direct case, and I have
4 given you the first several sections. I haven't
5 copied the portions that deal with the actual Board
6 survey in that case, but here is the reason that I
7 wanted to put it before you all so that we could look
8 at a concrete example.

9 If you would turn to page 10, which is the
10 second to the last -- I'm sorry, which is towards the
11 end what I have given you. You see there the first
12 page in Table 1 of a channel guide from Mile High
13 Cable Television of Denver. Do you see that?

14 A I do.

15 Q And then it continues on to the next page
16 as well.

17 A Yes.

18 Q And the reason that I have handed this out
19 is that I would like to look at the question of what
20 cable operators, what kinds of decisions cable
21 operators make in the context of a specific example,
22 just so we are more clearly in line to what we are

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1 talking about here.

2 Now, have you had a chance to review this
3 Table 1?

4 A Well, roughly, yes. Go ahead.

5 Q On the first page here there is a listing
6 of basic service, with a number of channel or station
7 names and category indicated. Do you see that?

8 A Yes.

9 Q And then over on the next page, there is
10 a listing of channels that are on an expanded basic at
11 the top of the page, and then a la carte services,
12 premium channels, and pay-per-view?

13 A Correct.

14 Q Now, based on you having just glanced at
15 this, do you think that this is a typical kind of
16 offering made by cable operators? I am looking in the
17 1998 time frame, and this may have been an earlier
18 period.

19 A Yes, you told me this is from 1990-1992,
20 and of course it is a very important event, which is
21 the '92 cable carriage which re-regulated cable. So
22 that might have had some impact.

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1 And by typical, I don't know what you
2 mean, but it is certainly an array of programming
3 which at the time for a fairly large capacity system
4 at the time would have been to my eyes not unusual.
5 Let's put it that way.

6 Q Okay. And on the first of these pages the
7 basic service, the categories include local broadcast
8 stations, as well as a couple of distant signals. Do
9 you see that?

10 A Yes, I do.

11 Q Now, how many of these channels on both
12 pages would the cable operator have voluntarily
13 selected in 1998? Let's assume that we are past the
14 must carry statute?

15 A You mean the must-carry is in effect?

16 Q Yes.

17 A Then I need also to know whether the local
18 stations invoke the must-carry or retransmission
19 consent, and I guess it is a little complicated that
20 way.

21 Q Let's just assume that all the local
22 broadcast stations are carried pursuant to must carry

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1 regulations, and by the way, must carry regulations
2 were adopted in the 1992 statute, and implemented by
3 FCC rules.

4 And they essentially require that cable
5 operators carry all of the television stations that
6 are within the same television market as the cable
7 system, and that is a simple version of that must
8 carry requirement; is that correct?

9 A That is one alternative. The other is
10 retransmission consent. The local station could deny
11 access, but doesn't get the payment it wants.

12 Q So let's come back and discuss that. I am
13 happy to discuss that with you at some length.

14 A Your question is how many of these reflect
15 the decision of the cable system on carriage; is that
16 it?

17 Q Right.

18 A Well, without doing careful research here,
19 the two distant signals would be discretionary
20 choices.

21 Q Okay.

22 A And then Galavision and the Learning

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1 Channel I suppose on the first page, most of these
2 local access channels are pursuant to a franchise
3 agreement with the municipality, and so they are not
4 discretionary.

5 And if all the local broadcast signals are
6 invoked must carry, those are not discretionary either
7 assuming that the channel capacity is there.

8 And then on the second page, page 11 of
9 this testimony, it looks to me without -- I mean,
10 without any further thought, that all of them are
11 discretionary for the cable system.

12 Q And that includes the a la carte service
13 as the premium channels and the pay per view?

14 A Yes, unless there is something specific in
15 the franchise agreement which requires them to carry
16 those things, which I would doubt.

17 Q So this cable operator with this number of
18 channels available to fill, has certain channels that
19 are filled or that are required to be filled either by
20 local broadcast stations or local access channels that
21 are required to be provided by the local franchises,
22 but with respect to all the other channels, including

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1 those on which they carry distant signals, a cable
2 operator may choose what to fill those channels with,
3 correct?

4 A Yes.

5 Q And what is the criterion in your view
6 that the cable operator follows in making those
7 choices?

8 A Well, as a profit maximizer, he has to
9 take into account what the response of his market
10 would be to alternative patterns of signal carriage,
11 and particularly because he earns most of his revenue,
12 or I suspect a very large share of his revenue, from
13 direct payments by his subscribers, and he has to take
14 into account which of these signals would add most to
15 subscriber payments.

16 That is, to subscriptions to his network,
17 or depending upon the regulatory framework in place at
18 the time, his ability to raise the price of that
19 package for adding different signals.

20 Q Now, with respect to the premium channels,
21 what you see is that this particular cable operator
22 offered \$11.95 per service per month. Do you see

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1 that?

2 A Yes.

3 Q But that means that if you took HBO and
4 Showtime, you would be paying something like \$24, or
5 a little less than \$24 per cable subscriber?

6 A That may be true. There usually are
7 packages of combinations which may or may not be shown
8 on this document.

9 Q Now, Mr. Bortz in his testimony -- let's
10 see. Over on page 14, in subparagraph 2 -- talked
11 about programming economics, and suggested that the
12 income from pay-per-view or from premium services is
13 divided generally about equally between the local
14 cable system and HBO, and his example. Do you see
15 that?

16 A Yes, that was his view of the time, '90-
17 '92, yes.

18 Q Was it different by '98?

19 A I have no idea how those deals are being
20 struck now.

21 Q Okay. All right. Now, when a cable
22 operator -- first of all, a cable operator had many

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1 more distant signals and cable networks to choose from
2 than the ones that are depicted as being carried here,
3 correct?

4 A My recollection is that that is correct.
5 The number of satellite delivered programming services
6 grew very rapidly after the deregulatory decisions of
7 the FCC in 1979. The precise number that were
8 available as of these dates I don't know, but I would
9 surmise that it would be substantially in excess of
10 what this operator has chosen.

11 Q I think that Mr. Trautman testified that
12 there were more cable networks certainly available
13 than there were channels to be filled in most cases.
14 Does that sound fair?

15 A Well, that may be true today. There
16 certainly has been a continual growth of the number of
17 these signals up on transponders, and what was true in
18 '90-'92 is simply not something that I recall today.

19 Q Now, when a cable operator was considering
20 whether to carry a distant signal, would the cable
21 operator know what the price was for the distant
22 signal?

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1 A Presumably, he would know if it is a
2 distant signal, and therefore subject to the
3 compulsory copyright, he would know the copyright rate
4 that would apply to the revenues which he obtained
5 from the tier in which he places the signals as I
6 understand it.

7 Q And similarly with respect to a cable
8 network, and some of these which are in the expanded
9 basic tier, would a cable operator know the price that
10 he would have to pay to carry one of them?

11 A Ex-post he would certainly know it.
12 Beforehand, that price is subject to some negotiation,
13 and it may be different for him or for his MSO than it
14 is for other cable systems. So that is a matter of
15 mano-mano negotiations.

16 Q So there is in effect the rate card price
17 or offering price that he might be able to ascertain
18 from the cable network that he is deciding whether or
19 not to carry?

20 A There may be. I don't know if they
21 publish rate cards. There is publicly available
22 information on what the typical rates are and they

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1 vary.

2 Q Well, one way or another, the cable
3 networks will quote a price to the cable operator,
4 correct?

5 A Well, in the negotiation over it I would
6 presume, yes.

7 Q Does the cable operator get to start at
8 the price that he would like to pay for a cable
9 network?

10 A I have no idea. When you sit down to buy
11 something, imagine going to a car dealership. It is
12 a similar sort of arrangement.

13 Q Now, with respect to cable networks, there
14 is also potential advertising revenue for the cable
15 operator to consider, correct?

16 A Yes, I believe that varies across the
17 networks as to how much of it there is.

18 Q So with respect to each of the cable
19 networks that we are talking about now, the cable
20 operator would presumably make a decision based on as
21 you suggested his profit maximizing position, as to
22 whether the addition of the cable network at the price

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1 that he can negotiate with the potential offsetting
2 advertising revenue is worth it to him, as compared
3 with other alternatives, correct?

4 A Yes.

5 Q Similarly with respect to a distant
6 signal, a cable operator has a sense of the price that
7 the distant signal is going to cost, and will make a
8 judgment as a profit maximizer about whether the added
9 value is worth the price, as compared with other
10 alternatives, correct?

11 A Yes.

12 Q With respect to distant signals, there is
13 no offsetting advertising revenue permitted, correct?

14 A That is my understanding.

15 Q Okay. Now, cable operators presumably, or
16 cable operators are not required to carry distant
17 signals are they?

18 A No.

19 Q The compulsory license, or the compulsory
20 part of the compulsory license is only compulsory on
21 us copyright owners, correct, and not on the cable
22 system?

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1 A That is correct.

2 Q So to the extent that cable operators do
3 carry distant signals, one could reasonably assume
4 that they have made determinations that carrying those
5 distant signals at the cost that they have to pay is
6 a profit maximizing alternative for them, correct?

7 A Yes.

8 Q And in fact the board survey is premised
9 on the assumption that cable operators make some kinds
10 of marketplace decisions, economic profit maximizing
11 decisions in determining whether to carry distant
12 signals, correct?

13 A Well, the board survey asks the operator
14 how he would allocate a budget. I mean, it is
15 possible that the cable operators is in business as a
16 charitable institution, but not very likely. I don't
17 think it is premised on that.

18 It simply asks the cable operator how much
19 or how would he allocate his budget. It doesn't ask
20 him whether he is a profit maximizer.

21 Q The Board survey only asks those questions
22 with respect to distant signals actually purchased

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1 during the year in question, correct?

2 A That's my understanding, yes.

3 Q Okay. Now, looking at this example, can
4 you identify the cases in which the cable operator has
5 created a channel of programming through direct
6 negotiations with individual copyright owners?

7 JUDGE VON KANN: You are referring to
8 pages 10 and 11?

9 BY MR. STEWART:

10 Q Yes, 10 and 11. I'm sorry, yes.

11 A Where he has actually negotiated directly
12 with the copyright owner?

13 Q Of particular programs to create a channel
14 of programming.

15 A Well, this ends in some respects -- I
16 mean, I don't know who owns the copyrighting in
17 certain types of programming. It may well be that
18 some of these basic networks, the network itself owns
19 the copyright or licenses the programming from the
20 copyright owner. I simply don't know enough of the
21 details.

22 Q Well, let me ask the question the other

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1 way around. Isn't it the case that with respect to --
2 let's say let's look at all of the channels on page 11
3 here.

4 A Yes.

5 Q This intermediary that you described in
6 your direct testimony is the one with which the table
7 operator is negotiating?

8 A Yes, but my answer to your question was I
9 don't know, because in some of these cases the
10 packager of the basic network itself might own some of
11 the copyrights. I simply don't know that.

12 Q But some of them might have licensed
13 others, but in effect put together a channel's worth
14 of programming with respect to which it, the packager,
15 negotiates with the cable operator?

16 A I would say that is the typical case, yes.

17 Q Right. And that remained the case through
18 1998 and 1999, correct?

19 A It is a similar marketplace, and there are
20 many more of these basic cable networks, and I would
21 assume that typically it is the same, yes.

22 Q Well, can you find any example in which --

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1 I have in mind a situation where, for example, if you
2 are talking about the NFL as a copyright owner, it
3 presumably would not be possible for a cable operator
4 to go with I would like an NFL channel in which there
5 is 24 hours a day, 365 days a year, of NFL games,
6 correct?

7 A I suspect that is not possible without the
8 NFL abrogating others in its contracts, but it is
9 certainly possible. I mean, I think that is something
10 similar to what Hughes did with DirectTV isn't it?
11 They negotiated a package of all the games directly
12 with the NFL I think, and with other sports teams.

13 Q But that package does not provide 24 hours
14 a day, 365 days a year; or in other words, a full
15 channel's worth of programming, continuous
16 programming, does it?

17 A No, it doesn't, but of course it is always
18 possible that the cable owner wants to negotiate with
19 the sports programming, and doesn't care about the
20 rest of those minutes. The rest of those minutes may
21 not account for any value at all.

22 Q You mean blank space on this hypothetical

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1 NFL channel?

2 A It might. I mean, there are stations that
3 go dark.

4 MR. STEWART: Well, okay. Then let's look
5 at the other side of the equation. I am handing out
6 a document which I would ask to be marked as NAB
7 Exhibit Number 7-X.

8 (Whereupon, NAB Exhibit No. 7-X
9 was marked for identification.)

10 BY MR. STEWART:

11 Q This is a copy of an article from the
12 Economic Journal of February 2001, and since you are
13 no busily reviewing it, I take it that you are
14 familiar with this?

15 A Well, you may have me at an advantage. You
16 probably read it more carefully than I have recently,
17 but let's go ahead. I wrote it about 3 years ago with
18 Professor Martin Cave from the United Kingdom.

19 Q Okay. And it is a description of the
20 sports broadcast industry in the United States and in
21 Europe, correct?

22 A Yes, and hopefully it is an analysis

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1 there, too.

2 Q And some analysis, yes; and did you write
3 the U.S. portion, and Professor Cave the European
4 portion?

5 A Well, certainly that was the way the
6 initial drafts were done back and forth. We had it
7 out between one another, and it is a joint work.

8 Q So you each learned about the other's
9 marketplace?

10 A Yes.

11 Q Would you turn, please, to page F-5, and
12 you see there in the first full paragraph on that page
13 the sentence, and I quote, "The bargaining power of
14 the seller of sports broadcast rights depends in part
15 on the number of alternative sources of such
16 programming that are available." Do you see that?

17 A Yes.

18 Q And this is in the -- is it in the U.S.
19 portion? Yes, sports in the United States.

20 A Yes.

21 Q And the paragraph continues to describe
22 the U.S. professional football leagues, and says that

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1 these leagues "currently have no professional
2 competitors in their respective sports. These
3 dominant positions have existed for at least two
4 decades." Do you see that?

5 A Yes.

6 Q And you made that point in order to
7 advance an analysis of the, in effect, market power or
8 bargaining power of the sports program rights sellers;
9 is that right?

10 A Well, also as a larger analysis of the
11 driving forces in the video market competition, too,
12 and contrasting the situation in the United States
13 with the situation in Europe.

14 Q And would you accept as a general
15 preposition something that seems commonsensical, that
16 if a seller has no competing sellers, it will be able
17 to exercise some kind of market power, or at least
18 will have better negotiating leverage when it is
19 trying to sell its product?

20 A That is almost by definition, that if it
21 has no competition, it has market power.

22 Q Good. This is going to go really well.

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1 A Right.

2 MR. GARRETT: That is what you think.

3 BY MR. STEWART:

4 Q I have talked with Dr. Crandall before. Is
5 the same true on the other side? That is, if there is
6 a single buyer for a product than multiple sellers of
7 the product, then is the buyer able then to have some
8 kind of market power or negotiating leverage in terms
9 of what the price will be for that?

10 A Yes.

11 Q Okay. And here on page 5, you are talking
12 about the fact that the National Football League and
13 Major League Baseball, and the National Basketball
14 Association, and the National Hockey League, don't
15 have any competing sellers of professional games in
16 those same sports, correct?

17 A That is what that earlier discussion was,
18 yes.

19 Q Okay. Would you turn to page F-9, please.
20 You see there again in the first full paragraph a
21 reference at the end of the first sentence to the
22 effect that the NFL, "had been barred by a Federal

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1 anti-trust case from pooling its television broadcast
2 rights into a single national contract." Do you see
3 that?

4 A Yes.

5 Q Now, the anti-trust laws, could you
6 explain why that was the case?

7 A Well, the premise here is that had they
8 attempted to do so, they would have been found to have
9 violated the Sherman Act for a combination in
10 restraint of trade.

11 Q And a combination in restraint of trade is
12 likely to have increased prices and/or reduced output;
13 is that right?

14 A Yes, if it can be demonstrated that
15 football, televised football programming, is an anti-
16 trust market.

17 Q Right.

18 A It is possible that football and baseball,
19 or other sports that are on at the same time, because
20 after all the leagues do overlap in time, constrain
21 one another's ability to raise price.

22 Q Okay,. but this anti-trust case, a

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1 decision in the Federal Court in times long past held
2 that when the NFL tried to sell in a single package
3 the rights to all of its games and preclude teams from
4 selling their rights in competition with each other in
5 effect, that that was an anti-trust violation, and it
6 was barred from doing so?

7 A I don't remember the litigation, but it is
8 possible that there was actual litigation, and that's
9 why they did not do it.

10 Q Okay. And then just continuing on in the
11 same paragraph, in 1961 the Congress passed the Sports
12 Broadcasting Act. Do you see that?

13 A Yes.

14 Q Could you explain what that Sports
15 Broadcasting Act did?

16 A Well, it allowed the pooling of these
17 rights in the form of a league contract, and to offer
18 it to a buyer, be it a broadcast network or a series
19 of cable companies for licensing their program.

20 Q Is it the case that it applies to cable
21 companies?

22 A No, you have got me on that. I do not

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1 know whether -- well, it may just supply the
2 broadcasting. You may be right. In '61 -- after all,
3 cable television really didn't get going in earnest
4 until the mid-to-late '60s. So it probably does apply
5 just to broadcasting.

6 Q Okay. So in essence this act made an
7 exception to this general anti-trust prohibition and
8 permitted the NFL to pool its game rights in order to
9 sell them as a single package?

10 A Yes.

11 Q And it applied to other sports and we will
12 get to that as well. Do you recall that it does apply
13 to other sports as well?

14 A Yes, sports broadcasting, and some
15 football.

16 Q And then you followed this by saying that,
17 "the result was a dramatic increase in the value of
18 national network television sports rights throughout
19 the 1960s as a network triply bid aggressively for the
20 right to broadcast NFL games." Do you see that?

21 A Yes.

22 Q And you have a chart at the bottom of the

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1 page, entitled, "Real Value of U.S. Networks Sports
2 Broadcast Rights, 1962 to 1998." And that describes
3 some of those increases, correct?

4 A Yes.

5 Q And in this context, when you use the word
6 value, you mean the price and real value is price
7 adjusted for inflation; is that right?

8 A It was the total value of the rights as
9 adjusted for inflation.

10 Q Value in terms of the money that was
11 actually paid for them?

12 A Yes, the total payments for all the games
13 that were licensed.

14 Q Okay. Turning over to page F-10, in the
15 first full paragraph again there, you describe the
16 effect of adding another buyer, a bidding buyer to
17 this mix, when a fourth offeror network, Fox, entered
18 the market. Do you see that?

19 A Yes.

20 Q Now, Fox entered the market as a national
21 network sometime before 1994, correct?

22 A That was an evolution. At what point they

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1 became a network I guess is subject to some dispute,
2 but yes.

3 Q And a network not for purposes of the 1119
4 issue, but a network --

5 A Yes, I believe that is right, but again
6 you are testing my memory. I think it was certainly
7 before '94.

8 Q Well, the NFL --

9 JUDGE VON KANN: Dr. Crandall, let me ask
10 you not to speak over the questions. We need to get
11 a clear question and answer record here if we can.

12 THE WITNESS: Okay.

13 BY MR. STEWART:

14 Q All right. Let's turn to page F-11,
15 please, and at the top of that page, there is a
16 carryover paragraph. And the reference is to -- if
17 you flip back to the previous page, you will see that
18 the reference there are to two companies, Direct T.V.
19 and EchoStar, and DISH Network. Do you see that?

20 A Yes.

21 Q Okay. And you say at the top of page F-11
22 that their growth has been hampered "by regulations

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1 and copyright provisions that limit their ability to
2 retransmit local broadcast signals in areas where
3 subscribers can receive these broadcast off-air."

4 Do you see that?

5 A Yes.

6 Q What did you mean by that?

7 A Well, this was before the passage of the
8 Act which provided for compulsory copyright for
9 retransmission of local broadcast signals on satellite
10 signals.

11 Q So the satellite service providers were
12 not permitted in this period to in effect send
13 Washington, D.C. broadcast signals down to subscribers
14 in Washington and Richmond signals to subscribers in
15 Richmond and the like; is that right?

16 A That's correct, without negotiating the
17 rights on them.

18 Q And did you -- and why did that hamper the
19 growth of these companies?

20 A Well, it is surprising to me, but
21 apparently there are a large number of people who
22 still value the local broadcast signals sufficiently

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1 that they would not switch from cable to direct
2 broadcast satellites, unless it also carried the local
3 broadcasting signal.

4 Q So, cable offered a package of services
5 like the ones that we looked at in Mile High Cable,
6 which included the local television stations, and the
7 satellite carriers provided a package of similar
8 services, not including the local television stations,
9 and that produced a competitive difference?

10 A Yes.

11 JUDGE VON KANN: Mr. Stewart, I think
12 maybe this is a good time to take our first break for
13 15 minutes. Let's come back at 10:45. Thank you.

14 (Whereupon, at 10:30 a.m., the hearing was
15 recessed and resumed at 10:45 a.m.)

16 JUDGE VON KANN: Okay.

17 MR. COOPER: Would it be useful for
18 purposes of lining up subsequent witnesses if we had
19 an estimation of how long the cross was likely to run?

20 JUDGE VON KANN: Okay. Do you have a
21 sense, Mr. Stewart?

22 MR. STEWART: I think possibly another

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1 hour.

2 JUDGE VON KANN: All right, and do other
3 folks have a -- Mr. Hester?

4 MR. HESTER: Your Honor, I think I might
5 be an hour to an hour and a half.

6 JUDGE VON KANN: Okay, well, let's see.
7 Anybody else? Music folks?

8 MS. WITSCHER: Very brief.

9 JUDGE VON KANN: Canadian? Brief, if any.
10 So maybe two to two and a half hours which would be
11 through lunch. So it sounds like you don't have to
12 get anybody here until after that. Okay?

13 BY MR. STEWART:

14 Q Dr. Crandall, would you turn to page F-13
15 of Exhibit 7-X, please?

16 A I'm there.

17 Q There in the middle of the page is the
18 discussion of the antitrust that you previously
19 discussed.

20 What I wanted to direct your attention to
21 the Table 5 at the bottom of the page there.

22 A Yes.

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1 Q Now this is a representation of the
2 percentage of the total revenues for each of these
3 sports that are derived from to sale of broadcast
4 rights. Is that correct?

5 A Yes.

6 Q So what other sources of revenue are there
7 for these sports leagues?

8 A Well, obviously, the live gate and then
9 merchandising revenues would be the principal sources
10 of revenues other than broadcast revenues.

11 Q And for baseball, basketball and hockey,
12 the gate receipts, the money that people pay to go see
13 the games themselves is higher than the broadcast
14 rights fees as a percentage of share, is that right?

15 A Well, the live receipts plus the
16 merchandise -- whatever other sources of revenues
17 there are, and merchandising.

18 Q Do you know, in fact, whether the gate
19 receipts are higher than the broadcast receipts for
20 these particular industries?

21 A I do not. I think the information might
22 have been available in the sources we quote, but I

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1 didn't see the need to cite it.

2 Q I want to show you the cite Kagan
3 publication there, do you see that?

4 A Yes.

5 Q I want to show you a Kagan publication
6 which is called Media Sports Databook 1998. Is this
7 the source of revenue used, do you recall?

8 A Well, let's see. Kagan's Media Sports
9 Business Databook 1998. Yes.

10 Q Okay, and if you look at page 31 which I'm
11 handing you, beginning there are NFL and MLB revenues
12 and on the next page NBA and NHL. Could you tell me
13 whether, in fact, the gate receipts represented a
14 larger percentage of total revenues for those latter
15 three sports than broadcast rights fees?

16 JUDGE VON KANN: In which year are you
17 looking at, 1997?

18 MR. STEWART: Maybe Dr. Crandall can
19 enlighten us.

20 THE WITNESS: This is a 1998 publication,
21 published in September 1998. Most of the data in here
22 would probably be drawn from say 1997 because if you

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1 look at the table of contents, the last year is
2 typically 1997.

3 And this is obviously Kagan's estimate of
4 these facts.

5 If I understand this chart correctly, the
6 gate receipts which do not include the venue receipts,
7 it must be merchandizing, stuff at the park, the gate
8 receipts exceed the media receipts for the NHL and for
9 Major League Baseball, but for the MBA they're
10 slightly less and for the NFL they're substantially
11 less.

12 BY MR. STEWART:

13 Q Now are you familiar with sports blackout
14 rules, either in the federal statutes or in FCC
15 regulations?

16 A I am no longer familiar with them. I
17 might have been at one time.

18 Q Well, we probably share the same degree of
19 sophisticated understanding of them, but in essence
20 those rules allowed the sports league to black out a
21 telecast of a game coming into a market on a distant
22 signal if -- just to make it sort of big picture, if

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1 that would compete with the actual gate receipts for
2 the game being played in the market.

3 Is that roughly correct? Is that your
4 understanding as well?

5 MR. COOPER: I object. He's already
6 testified he doesn't understand the rules.

7 JUDGE VON KANN: Maybe he does, maybe he
8 doesn't. We'll see.

9 THE WITNESS: Well, the purpose, whatever
10 the rule is and whether it's one invoked by the league
11 and permitted by the FCC or whatever, the purpose
12 obviously would be to allow the league some latitude
13 or perhaps the team some latitude in blacking out the
14 broadcast in cases where it has a substantial effect
15 on a gate.

16 In virtually every case, one would imagine
17 that the broadcast of the game competes with the live
18 attendance.

19 BY MR. STEWART:

20 Q Yes, because you could stay home and watch
21 the game on television, local television or distant
22 signal instead of going out and buying a ticket to go

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1 to a game.

2 So this was a mechanism that allowed
3 somehow for the deletion of the program from the
4 distant signal in order to protect the different
5 source of economic interest or revenues for the sports
6 teams, correct?

7 A That's my understanding, yes.

8 Q And if the -- strike that. Would you turn
9 to page 14, F-14 of Exhibit 7-X, please.

10 I want to talk about the second full
11 paragraph there, the "in addition, individual teams"
12 paragraph, do you see that?

13 A Yes.

14 Q So it's the case for the NFL that the
15 individual teams do not sell their games separately,
16 is that right?

17 The NFL sells national rights to all the
18 regular season and play off games?

19 A I believe that's true.

20 Q With respect to Major League Baseball,
21 there is some combination of rights sales, is that
22 correct?

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1 A That's correct.

2 Q So that the league, in effect, sells some
3 national broadcast rights for some of the games,
4 correct?

5 A Yes.

6 Q Sells them both to broadcast television
7 and to cable networks as well?

8 A Yes.

9 Q And then in addition to that, but that
10 doesn't encompass all the games that are played during
11 the course of a season and so on.

12 In addition to that, the individual teams
13 can negotiate for the sale of broadcast rights for
14 other games that they play, correct?

15 A Yes.

16 Q And the teams will sell those rights to
17 local broadcast television stations, correct?

18 A In some cases, yes.

19 Q And in other cases where else might they
20 sell them?

21 A Regional cable networks. Often a
22 combination of the two.

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1 Q Okay. Now the second sentence of this
2 paragraph says, refers to "league limitations on a
3 team's right to sell broadcasts of its games to local
4 outlets, regional sports networks or other broadcast
5 services."

6 Do you see that?

7 A Yes.

8 Q Can you tell me what kinds of limitations
9 leagues impose on a team's right to sell those
10 broadcast rights?

11 A Well, I don't recall and this was
12 something as you see from the paragraph in question,
13 footnote 10 was litigated, involving the Chicago
14 Bulls. And the issue would always be the exportation
15 of a signal into the market of another team, thereby
16 taking away some of the audience and therefore some of
17 the potential revenue from the rights of that other
18 team.

19 Q Are you familiar with the mechanism for
20 imposing these kinds of limitations?

21 A No, I am not.

22 Q Are you aware whether there are other

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1 kinds of limitations than the one you just suggested
2 that are imposed by the leagues on the teams?

3 A I'm not aware of them in any detail, only
4 occasionally over many years and sort of informal
5 discussions. I've never studied them carefully.

6 Q Do you recall any others besides the one
7 limiting distant exportation, I guess, of games?

8 A I can't offhand, no.

9 Q How about the Bulls case that's referred
10 to there in the footnote? That was a litigation in
11 which the Chicago Bulls joined with the station, WGN,
12 to sue the National Basketball Association under
13 antitrust and other laws because of a limitation the
14 NBA wanted to impose on the number of games that the
15 Bulls were allowed to license to WGN, correct?

16 A That may be correct. I think I read the
17 case in doing this research, but that would have been
18 three or four years ago and I simply don't remember
19 the details as to who was the plaintiff and who was
20 the defendant.

21 Q Do you recall the outcome of that case?

22 A No, I don't know. I honestly don't. I'm

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1 sorry.

2 Q You cited that case as an example in which
3 the League sought to impose a limitation on the number
4 of games that could be broadcast on WGN?

5 A I don't know whether it was a quantitative
6 number or a geographical scope, but the -- my language
7 here and the sentence which cites that case says thus,
8 even sports teams in leagues with national network
9 contracts may sell broadcast rights in games in which
10 the league has no broadcast rights even though such
11 games may dilute the value of the national contract.
12 That's suggests, I guess, that the case came out
13 allowing WGN to do this.

14 Q Would you turn to page F-21 of this
15 exhibit?

16 A Yes.

17 Q The second full paragraph on that page
18 begins "were there greater competition among leagues,
19 the prices of these now ubiquitous U.S. telecasts
20 might be lower." Do you see that?

21 A Yes.

22 Q And that harkens back to the general sort

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1 of common sense principle that we agreed on at the
2 beginning of my cross examination, that is if there
3 were more competition, the effect of that likely would
4 be to reduce the price of the rights being licensed?

5 A Certainly.

6 Q Okay. You go on to say "but the output of
7 televised sports events would probably not be much
8 greater".

9 Do you see that?

10 A Yes.

11 Q And there, you're considering the number
12 of games licensed across all outlets including
13 broadcast stations and cable networks and national
14 television networks and satellite services and
15 regional sports networks?

16 A Yes.

17 Q Any others besides that list?

18 A You covered most of them.

19 Q I want now to hand you a copy of some
20 other testimony that you've -- that's been
21 incorporated by reference into this.

22 JUDGE VON KANN: Do you wish to offer

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1 this?

2 MR. STEWART: This is going to be another
3 demonstrative exhibit under the --

4 JUDGE VON KANN: Let's deal for a moment
5 with 7-X. Do you wish to offer that?

6 MR. STEWART: I do. I move that be
7 admitted into evidence.

8 MR. COOPER: No objection.

9 JUDGE VON KANN: Okay, received.

10 (The document, having been
11 marked previously for
12 identification as NAB 98-99
13 Exhibit 7-X was received in
14 evidence.)

15 BY MR. STEWART:

16 Q This is actually testimony. Do you
17 recognize that, Dr. Crandall?

18 (Whereupon, the above-referred
19 to document was marked as NAB
20 98-99 Demonstrative Exhibit 2
21 for identification.)

22 A I believe it was my testimony in the 1989

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1 proceeding?

2 Q I think this actually was -- yes, it was
3 submitted in the 1989 Cable Royalty Distribution
4 proceeding. It's under -- it's Volume 2, Tab 8 of the
5 incorporated testimony by the Joint Sports Claimants.

6 This was rebuttal testimony rebutting some
7 testimony that had been submitted on behalf of the
8 Program Suppliers Claimants by Dr. Besen.

9 Do you recall that?

10 A I thought that was the testimony in the 90
11 to 92 case. Now you're testing my memory. This, I
12 thought -- this is the 1989 testimony? I believe this
13 is -- I don't recall it as rebuttal testimony direct.
14 I thought this was direct. I

15 It's a lawyer's distinction more than an
16 economist's distinction. You'll have to tell me.

17 Q This testimony actually, I think was
18 presented by the Sports Claimants as well in its
19 written form in the 1990 to 1992 case, but if you just
20 glance at the testimony you can see there that you are
21 responding to arguments that were made by Dr. Besen.

22 A Yes, but --

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1 Q And that's in the 1983 proceeding.

2 A Right. Because in a later rebuttal
3 testimony I was responding to something he did in that
4 case, 90 to 92.

5 Q This is responding to something he did in
6 the 1983 case.

7 A I can only plead that I'm an economist and
8 not a lawyer.

9 Q You've got that distinction better than I
10 do. If you would now, Dr. Besen had made one point
11 that -- which is an economist's distinction from my
12 lawyer's perspective that the Bortz study measured
13 total value and not marginal value.

14 Do you recall that?

15 A Yes.

16 Q And one of the first parts of your
17 testimony was in response to that criticism of the
18 Bortz survey?

19 A Yes.

20 Q And if you would turn to page 7 which is
21 difficult to read on this copy, but it's the second
22 page after roman 3 summary of conclusions?

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1 A I see it.

2 Q In the first full paragraph there after
3 having given your first response which had to do with
4 elasticities, your second point is that "the Bortz
5 study's estimate of total value are a valid measure of
6 marketplace value if the cable operators faced in an
7 all or nothing choice for each program type."

8 Do you see that?

9 A Yes.

10 Q Now do you believe that that is a fair
11 assumption in the context of these compulsory license
12 proceedings?

13 JUDGE VON KANN: I'm sorry, what page are
14 you on?

15 MR. STEWART: Seven. It's hard to read at
16 the top there.

17 JUDGE VON KANN: All right, thank you.

18 BY MR. STEWART:

19 Q And at the end of the first sentence of
20 the first full paragraph, that's the sentence.

21 A This hypothetical was a second
22 hypothetical. The first one I dealt with was the

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1 relevant price elasticity of demand, assuming they did
2 not negotiate and all or nothing contract with the
3 owners of all the copyright rights. I said, however,
4 if they did, then the distinction between marginal and
5 total value is not important because total value
6 captures the entire area under the cable operators'
7 demand curve and therefore it would be an appropriate
8 measure.

9 Q And in fact, for those with interest in
10 demand curves, there's more detail later in this
11 document.

12 In the next paragraph you point out that
13 the viewing study is not a measure of marketplace
14 value. That was your testimony in that case, correct?

15 A Yes.

16 Q And in the next paragraph at the bottom of
17 that page, you talk about the supply effects, do you
18 see that?

19 A Yes.

20 Q You say that part way down that paragraph,
21 "In fact, I believe quoting that these supply effects
22 are likely to be more important for sports than for

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1 movies and syndicated series because the loss of
2 exclusivity in the initial exhibition of a sports
3 event cannot be recaptured in frequent reruns of the
4 event."

5 Do you see that?

6 A Yes.

7 Q Is that the same point you make in your
8 testimony that was submitted in --

9 A It's an analogous point, yes.

10 Q Okay. So with respect to programs that
11 are live and not repeated like sports games and I
12 might add station produced newscasts, the supply side,
13 the effect of considering supply side conditions to
14 favor live, not repeated program categories as opposed
15 to program categories that are subject to rerun,
16 correct?

17 A I'm not sure that that is the case. It
18 isn't necessarily just programming is live. It also
19 has to do with whether there are any other ancillary
20 benefits from licensing the program.

21 If the carriage of the program allows the
22 copyright owner to exploit greater advertising

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1 revenues, for instance, then that copyright owner
2 might offer it at a lower price. And that might be
3 true for a broadcast signal because it gives the
4 broadcast signal greater geographic scope and perhaps
5 allows it to advertise over a broader market.

6 It would not be true for the types of
7 copyrighted sporting events we're talking about in
8 this case with the Joint Sports Claimants, I do not
9 believe.

10 Q Do you believe that -- Commissioner
11 Tagliabue testified that the amount of the license
12 fees received by the NFL was significantly influenced
13 by the potential advertising revenues of the
14 purchasers of the rights and the programming.

15 A Certainly.

16 MR. COOPER: I'm not sure, I don't believe
17 that's a fair characterization of the weight -- I mean
18 if you want to ask him -- I think it's fine to ask
19 him, but I'm not sure that your research is right and
20 I object.

21 JUDGE VON KANN: I think we probably have
22 a transcript of that. If it's critical to get the

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1 exact language, maybe you can refer him in a general
2 way without purporting to precisely characterize
3 Commissioner Tagliabue's testimony.

4 BY MR. STEWART:

5 Q Thank you. In general, the rights fees
6 attained or obtained by sports leagues, when they sell
7 their rights into national advertising supported
8 broadcast networks, are influenced by the potential
9 advertising revenue received by the buyers in that
10 market, correct?

11 A Well, but the copyright owner in this case
12 does not get those advertising revenues directly. He's
13 getting only the copyright payment. The only possible
14 minor ancillary revenues he might get, if he gets
15 greater exposure for his product might be some more
16 merchandising revenues. But in the case of the
17 broadcast station which is licensing its copyright
18 material in an adjacent market, it obtains the ability
19 to sell more advertising dollars, obtain more
20 advertising dollars from that greater geographical
21 expanse of its market.

22 The NFL, Major League Baseball, do not.

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1 Q But the -- strike that. To the extent
2 that the purchase of the rights devises all of its
3 revenue from advertising sales and to the extent that
4 those advertising sales are potentially greater, the
5 amount of the rights fees to be paid or in this
6 bidding context that we have nowadays, the amount of
7 the rights fees bid by various broadcast networks is
8 increased, correct?

9 A Yes, but had Bortz surveyed network
10 programming managers and asked them why they paid so
11 much for these rights, the answer would then obviously
12 be the advertising revenues. When he surveys the
13 copyright owners and it has nothing to do with the
14 advertising revenues in that programming, generally
15 for the copyright owner or for the seller of the
16 rights.

17 The seller of the rights is not trying to
18 get greater coverage in order to be able to sell
19 advertising himself.

20 Q Okay, now for a broadcast station, are you
21 familiar with advertising sales by broadcast stations?

22 A I've been a student of broadcasting

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1 markets off and on for 25 years. I've never been
2 involved in the nitty gritty of negotiating these
3 deals, no.

4 Q Do you know whether the advertising sales
5 are heavily dependent upon ratings in the television
6 market in which the station is broadcasting?

7 A I would think that they would be,
8 particularly for the local spot, but I suppose as the
9 signal becomes more of a national signal because of
10 distant signal imports that the spread of the signal
11 would influence the national spot rates it gets.

12 Q And you raise, in effect, the super
13 station phenomenon with that comment, correct?

14 A Yes, I guess so.

15 Q And Mr. Garrett in his opening statement
16 made the point that there is in the 1998-1999 context
17 essentially one super station, WGN. The rest of the
18 distant signals are carried to relatively far fewer,
19 by relatively far fewer cable systems in this
20 1998-1999 period.

21 If you will accept that as a premise, then
22 laying aside the super station phenomenon, are there

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1 advertising revenues to be derived by a local
2 broadcast station from carriage in a variety of
3 distant other television markets?

4 A This would be an empirical issue that I
5 haven't looked at, but I would not be surprised that
6 the exporting of the Los Angeles signal, let's say,
7 slightly outside the ADI or whatever it's now called,
8 Los Angeles, would convey some ability to sell more
9 advertising, at least advertising the higher rate, but
10 I don't have independent, empirical evidence of that.

11 Q If it were the case that the ratings and
12 that outside the Los Angeles market television market
13 were reported in somebody else's book and not the Los
14 Angeles book, would it make it difficult for the Los
15 Angeles station to sell that advertising, would it
16 not?

17 A It would certainly make it more difficult.
18 There has to be information on the reach of the
19 signal.

20 Q Would you turn to page 12 of your
21 testimony, please?

22 A My testimony in this matter?

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1 Q Yes.

2 (Pause.)

3 One more question on the advertising. Did
4 Major League Baseball have any rights to advertising
5 revenues in the national broadcasts of its games in
6 the 1990s?

7 A I don't know. The programs are often sold
8 with some barter rights, but I don't know whether
9 there's any of that in any of the sports rights. I
10 can't tell you.

11 Q To the extent that there is barter
12 involved, the copyright owner, in this case, a sports
13 league, would have a direct interest in advertising
14 revenues?

15 A If there is barter. It's my understanding
16 there isn't much of it. But I'm not aware of the
17 phenomenon for these sports leagues, but it may be the
18 case.

19 Q Could you explain what barter is?

20 A Barter is simply offering the program to
21 the purchaser in return for some revenues from the
22 purchaser, but also in return for the purchaser

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1 granting the copyright owner or some intermediary the
2 right to advertise a certain number of sports in that
3 program. So not all of the advertising is placed by
4 the person licensing the program.

5 Q Okay, back to page 12. Thank you for
6 that. In paragraph 24, the third sentence reads,
7 "broadcasters have demonstrated a greater interest in
8 securing carriage on cable systems and making their
9 programming available to as many cable system
10 subscribers as possible at the lowest possible price."

11 Do you see that?

12 A Yes.

13 Q You use the word "greater" there, but
14 there's not a comparison. Greater than what?

15 A I guess what I'm referring to there as
16 expressed under the sports programmers, the
17 immediately preceding sentence.

18 Q You say in the following sentence "I am
19 not aware of any similar evidence of JSC members." Do
20 you see that?

21 A Yes.

22 Q What evidence with respect to broadcasters

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1 are you referring to? I assume that's again a
2 comparison statement?

3 A Yes.

4 Q What's the evidence you have in mind?

5 A The evidence is that the broadcasters have
6 pushed for legislation, supported legislation which
7 indeed passed, which regulated the basic cable tier
8 and reduced cable rates on the broadcast tier, thereby
9 reducing the revenues to themselves from copyright
10 royalties and to other interests -- other copyright
11 owners. And have also supported, obviously very
12 aggressively, must carry regulations in which the
13 station is carried at a zero copyright rate.

14 Q And the rate regulation legislation is the
15 subject of Dr. Hazlett's testimony in this proceeding.
16 Are you aware of that?

17 A That's my understanding. I've read his
18 testimony. I haven't talked to him about it, but
19 that's my understanding.

20 Q Do you have other evidence you wanted to
21 bring to the attention of the panel beyond what Dr.
22 Hazlett's testimony will provide?

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1 A No, I think having lived through that and
2 written a book about cable television regulation, as
3 these rules are being implemented, I think it's
4 incontrovertible as to the broadcaster's position on
5 these rights, so I can't tell you who, which
6 organizations were lobbying precisely at what time.

7 Q I've read your book. I've even bought
8 your book.

9 A So that's a second sale, I guess.
10 (Laughter.)

11 Q I don't want to have to go through all of
12 the Dr. Hazlett cross examination with you. I guess,
13 in short, if you talked about the rate regulation and
14 the must carry, is there anything else that you
15 consider to be evidence of broadcasters demonstrating
16 interest in securing carriage at the lowest possible
17 price?

18 A Those would be the principal ones. But I
19 think you're quite right. It's probably something
20 best left to discuss with Dr. Hazlett.

21 Q You talked about, you mentioned earlier
22 on, retransmission consent. What is your -- why did

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1 you bring that topic up?

2 A You'll have to remind me how it came up.

3 I don't remember the context of it.

4 Q Is retransmission consent, in your view,
5 relevant to the allocation of royalties in this
6 proceeding?

7 A It could be with respect to the issue of
8 supply conditions and how retransmission consent has
9 worked out in practice might be relevant to the
10 Panel's deliberations.

11 Q How so?

12 A Well, if, in fact, there has been
13 relatively little retransmission consent, little in
14 the way of retransmission consent payments and indeed,
15 most of the carriage of local broadcast signals on
16 cable systems has been at a zero copyright rate as the
17 broadcaster invoked must carry, rather than attempting
18 to obtain or succeeding in obtaining large amounts of
19 payments of retransmission consent, it would be
20 evidence on the willingness of broadcasters to
21 negotiate with copyright owners and their ability to
22 negotiate with copyright owners for the carriage of

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1 that programming.

2 Q First, you talked about electing must
3 carry at a zero copyright rate. Was that your term?

4 A Well, invoking -- yes. Invoking must
5 carry, requiring the cable system operators to carry
6 it, right.

7 JUDGE GULIN: Isn't it your understanding
8 that there would be very little in the way of payments
9 under retransmission consent?

10 THE WITNESS: That's my understanding. I
11 haven't looked at it recently, but there was a
12 considerable amount of discussion of this when it
13 first went into effect after 1993, I guess.

14 And in some cases the larger stations were
15 able to obtain essentially a tied arrangement where
16 they would obtain yet the cable system owner to carry
17 an ancillary or co-owned network. I don't know at
18 what rates. It might have been very low rates, but
19 the impression which I got when I put the book that
20 Mr. Stewart and I were discussing to bed, was that
21 there had been very few of these arrangements
22 negotiated and most of them were must carry

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1 arrangements.

2 JUDGE GULIN: In fact, some of those
3 arrangements, I may be mistaken, but I think under
4 some of those arrangements, the fledgling cable
5 network would be carried actually for free. There
6 would be no royalties anticipated. Do you have any
7 understanding of that?

8 THE WITNESS: It's something -- it's an
9 empirical question. I haven't looked at it recently
10 and it's been a number of years since I investigated
11 that. Sorry.

12 BY MR. STEWART:

13 Q I intended to get to this in some detail,
14 but going back first to the must carry context, you
15 called it a zero copyright rate, do you recall that?

16 A Yes.

17 Q That's not a retransmission consent
18 negotiation, correct?

19 A Well, it's an alternative to
20 retransmission consent, my understanding.

21 Q In 1976 -- in 1978 when the compulsory
22 license first went into effect, under the Copyright

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1 Act of 1976, there were must carry rules in effect at
2 the time, correct?

3 A Yes, for a short period of time, as I
4 recall.

5 Q And then they came back later and went
6 away and then they came back again, correct?

7 A I guess over time.

8 Q But the Section 111 license from the very
9 beginning of the existence of a compulsory license
10 provided for zero payments for must carry stations or
11 for any local stations, no matter how they were
12 carried, correct?

13 A I believe that's correct, but again, it's
14 something that I haven't looked at recently.

15 Q A compulsory license overrides any right
16 of the broadcast station as a copyright owner to
17 refuse to allow a local to carry it, correct?

18 A I don't understand the law perhaps as well
19 as you do, but it's my understanding you have a
20 choice. You can either invoke must carry or you can
21 attempt to deny the signal to the cable operator and
22 not invoke must carry and attempt to obtain some

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1 copyright royalties through the retransmission consent
2 agreement.

3 Q That's exactly my question. Those are not
4 copyright royalties, are they?

5 A They are revenues paid -- you mean under
6 retransmission consent?

7 Q Correct.

8 A They are revenues paid to the station
9 which in turn would provide him with a greater revenue
10 base which in turn would give the station owner the
11 ability to pay more to whatever copyright programming
12 might be on that station, but also the programming
13 which he, himself produces.

14 Q Let's be clear. The compulsory license
15 which is the subject of this proceeding specifically
16 provides that for every copyright owner, the stations
17 for its own programs, the sports leagues for their
18 programs, the Motion Picture Association for their
19 programs, none of them receive copyright royalties for
20 the local retransmission of their programs, correct?

21 A I don't know how you're putting that, but
22 in this proceeding, we're dealing with the distant

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1 signal. You and I are not talking about the local
2 must carry retransmission consent rules.

3 Q Exactly and that's why I wanted to be sure
4 we were clear on this.

5 With respect to the local systems and
6 that's why you called it a zero copyright rate, the
7 copyright law provides that none of us copyright
8 owners get any compensation any copyright royalties
9 for cable operator retransmissions of stations within
10 their local market, correct?

11 A Well, that may be true, but that may be a
12 distinction without a difference. The question is
13 what's in the interest of the station owner and can he
14 obtain revenues from the cable system through this
15 negotiation process or does he, is he forced to simply
16 revert back to must carry and obtain zero. If it's
17 zero, it's nothing, so it's not a copyright rate or
18 anything.

19 Q You need to be very careful about what's
20 copyright royalties which are the subject of this
21 proceeding and what are other revenues and that's what
22 I'm trying to do.

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1 With respect --

2 A But we're talking about a negotiation
3 process which exists in actuality as providing
4 evidence on a simulated market that would exist in the
5 case of distant signals. And what I'm saying is that
6 when push comes to shove in this negotiation, the
7 local signal owner, the broadcast station is not able
8 to negotiate or is unwilling to withhold this product
9 in return for obtaining a substantial copyright
10 royalty. That is, he prefers -- well, one of the
11 things he could do is to -- I mean this is, after all,
12 a bargaining game. He could withhold his signal from
13 the cable system and after a month, two months, six
14 months, say do you want it at some price? They choose
15 for the most part not to do it because the loss of
16 advertising revenues apparently exceeds any potential
17 gain from copyright royalties or from revenues they
18 could get in this fashion.

19 Q You said twice again in that answer that
20 the broadcast station could receive copyright
21 royalties for allowing local retransmission of its
22 signal.

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1 Will you accept as a matter of law that
2 that is not correct?

3 A I am not a lawyer and I would say that if
4 that is true, I'm happy to accept it, but it is again,
5 as I said earlier, a distinction without a difference.

6 Q And is there a distinction with a
7 difference in your view between local retransmissions
8 and distant retransmissions?

9 MR. COOPER: I object. I'm not sure for
10 what purpose.

11 JUDGE VON KANN: Objection sustained.
12 Let's clarify a little bit the frame of reference.

13 BY MR. STEWART:

14 Q Well, Dr. Crandall, you believe somehow
15 that the retransmission consent negotiation or the
16 retransmission consent rights are relevant in this
17 proceeding?

18 A As I answered earlier, it strikes me that
19 the retransmission must carry phenomenon and how it is
20 worked out in practice is important evidence that the
21 Panel could consider in determining the supply side
22 conditions of this market.

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1 Q And if you -- let me state a premise to
2 you. Local retransmissions of stations are not a part
3 at all in royalties that are being distributed in this
4 proceeding? Will you accept that as my statement?

5 A Yes, I believe that's correct. We both
6 agree on it.

7 Q Then does that change your view about
8 whether the retransmission consent in the local market
9 within the must carry or retransmission consent
10 optional rules within the local market is relevant to
11 what the Panel is doing here?

12 A No, it does not. I believe it is relevant
13 because it reflects the willingness of the station to
14 allow the cable system to carry his programming at a
15 zero revenue, whatever you want to call the source of
16 that revenue. And not to withhold it because he does
17 not wish to deny himself the ability to obtain
18 audience in that market which would be obtained
19 through cable transmission and therefore, the
20 advertising revenues.

21 Q In your view, is there any distinction
22 between the local market version of that and other

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1 markets?

2 A Well, you and I discussed somewhat earlier
3 the distinction between local spot and national spot
4 and how it's measured. There could be, but in terms
5 of evidence on the willingness of broadcasters to
6 offer their signal for retransmission by another
7 medium, namely cable, at a zero price, it seems to me
8 this is evidence the Panel would want to take into
9 account, if they're going to get into this issue of
10 the supply side considerations that have been raised
11 in previous proceedings.

12 Q Okay, with that condition, and you said
13 before that you're not fully aware of whether
14 compensation has been paid across the board to
15 broadcasters, correct?

16 A I think I said at the time I put my 1996
17 book to bed, the evidence was that not much was being
18 paid and it's my impression that much has changed in
19 that regard, but I have not studied it recently.

20 Q You don't have comprehensive facts,
21 evidence to share with the Panel on whether or not
22 there are payments made?

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1 A I do not have any empirical evidence with
2 me now, no.

3 Q But your point is that if, in fact,
4 compensation is not paid, then that's relevant in the
5 ways that you've described to whether the supply side,
6 how the supply side considerations should be applied
7 to adjusting the Bortz Study?

8 A There's certainly evidence for that
9 purpose.

10 Q So it's, in effect, an opportunity that is
11 not taken or is somehow not capitalized upon, correct?

12 A It's not necessarily an opportunity not
13 capitalized upon. It's a reflection of the economics
14 of broadcast stations. They depend very heavily on
15 advertizing revenues and the amount of money that they
16 apparently can gain from threatening to withhold their
17 signal for retransmission on a cable system is much
18 smaller, apparently, than the money that they would
19 lose from not gaining carriage, from advertising
20 revenues.

21 Q And it's your view that when the
22 broadcaster in the local market, if the broadcaster in

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1 the local market does not obtain compensation, that
2 that reflects somehow on the nature of the
3 broadcaster's interest in obtaining compensation under
4 the Copyright Act for its programs?

5 A It reflects the supply conditions in that
6 marketplace because of the source of revenues to the
7 broadcaster.

8 Q And the broadcaster has the opportunity to
9 seek such additional revenues under the retransmission
10 consent law and rules, correct?

11 A Yes.

12 Q I'd like to introduce as Exhibit 8-X, a
13 copy of the 1992 Cable Act.

14 (Whereupon, the above-referred
15 to document was marked as NAB
16 98-99 Exhibit 8-X for
17 identification.)

18 (Pause.)

19 If you would turn over to the page that's
20 labeled in the upper right hand corner, 106 STAT 1483.
21 This Section 6, retransmission consent for cable
22 systems, is the provision that this Act amended the

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1 Communications Act to provide for retransmission
2 consent. And I would ask you to look at the last
3 subparagraph of Section 6 which is in parentheses 6
4 over on page 1483 on the right hand side of this page.

5 Do you see that?

6 A Yes.

7 Q It says "nothing in this section" -- I'm
8 quoting -- "shall be construed as modifying the
9 compulsory copyright license established in Section
10 111 of Title 17, United States Code, or as affecting
11 existing or future video programming licensing
12 agreements between broadcasting stations and video
13 programmers."

14 Do you see that?

15 A Yes.

16 Q Now are you aware that the retransmission
17 consent right granted in this statute was implemented
18 by the FCC in regulations that it adopted?

19 A I suppose it had to be, yes. They would
20 be the ones.

21 Q I want to show you as 9-X, I'm sorry, may
22 I move for the admission of 8-X.

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1 MR. COOPER: I don't know why you would
2 need to move the admission of a copy of a statute.
3 It's the law. It's not evidence.

4 On the other hand, I don't want to burden
5 the record.

6 MR. STEWART: Of course, you could take
7 official notice of this. I simply am following
8 routine.

9 JUDGE VON KANN: I don't think we need to
10 have it received as an evidentiary exhibit, given that
11 it's the law and we can all take notice of it, but I
12 don't have any strong objection either, frankly.

13 Why don't we receive it in an abundance of
14 caution and recognize that we haven't added much that
15 we couldn't have done without receiving it.

16 (The document, having been
17 marked previously for
18 identification as NAB 98-99
19 Exhibit No. 8-X, was received
20 in evidence.)

21 MR. COOPER: Just for clarification, I
22 assume --

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1 JUDGE VON KANN: I don't think everybody
2 else has to offer statutes, if they don't want to.
3 But since he went to the trouble of xeroxing all these
4 copies, it seems unkind.

5 MR. COOPER: I assume this is the
6 relevant, I mean to the extent there would be later
7 any dispute about whether this is actually the
8 effective law, I assume we haven't waived that by
9 allowing the admission of this.

10 JUDGE VON KANN: If somehow we've got it
11 wrong, we can deal with that.

12 MR. STEWART: Thank you. And I believe I
13 moved for the admission of Exhibit 7-X. That was the
14 article that was written by Dr. Crandall.

15 JUDGE VON KANN: It was received.

16 JUDGE GULIN: To clarify, are you
17 suggesting that the lack of payments under
18 retransmission consent goes to the supply side
19 considerations with respect to all of the copyright
20 owner types within the signal or only to NAB, locally
21 produced programs?

22 THE WITNESS: NAB is the program, excuse

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1 me, the broadcast station is unable to obtain revenues
2 for what it is offering which is its signal. If, in
3 fact, it is unable to do so, then it does not enhance
4 its revenue position in negotiating with these other
5 people who supply programming. It has nothing to do
6 with the compulsory license in this case. It has to
7 do with how much they are able to -- the copyright
8 owners are able to negotiate independently with a
9 broadcast stations for programs they license directly
10 to it.

11 Let's say it's an independent station and
12 it buys syndicated programming. The fact that it is
13 unable to negotiate a substantial amount of
14 retransmission consent means it doesn't add to its
15 revenue base from which the copyright owner for the
16 syndicated programming can obtain a share. It doesn't
17 apply to the Claimants in this case.

18 MR. STEWART: I would like to have
19 introduced as NAB Exhibit 9-X, a comment filed in the
20 FCC proceeding on behalf of Major League Baseball.

21 (Whereupon, the above-referred

22 to document was marked as NAB

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1 98-99 Exhibit 9-X for
2 identification.)

3 BY MR. STEWART:

4 Q Would you turn over to the third page of
5 this exhibit?

6 A Right, okay.

7 Q You'll see that the proceeding has
8 implementation of the 1992 Act.

9 A Uh-huh.

10 Q An issue was raised in that proceeding
11 with respect to the interpretation of that last clause
12 that we just read in the statute about the extent to
13 which retransmission consent would affect existing or
14 future video programming licensing agreements between
15 broadcasting stations and video programmers.

16 And the issue was whether programmers
17 could, in fact, negotiate to take over or limit a
18 condition of retransmission consent, the operation of
19 the retransmission consent rights by the broadcasters,
20 the exercise of those rights by the broadcasters. Are
21 you familiar with that?

22 A I'm not familiar with that issue, no.

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1 Q Here, you'll see that Major League
2 Baseball is -- refers to comments filed by Tribune.
3 Are you familiar with Tribune?

4 A Yes.

5 Q What is that?

6 A Tribune is a media organization in
7 Chicago, among other things, at least probably at this
8 time, I don't know if it's still true, owns newspapers
9 and even sports teams.

10 Q And Major League Baseball says here that
11 the Tribune comments cited certain "recently adopted
12 standard provisions of baseball club broadcast
13 contracts."

14 Do you see that?

15 A Yes.

16 Q Is that -- does that refresh your
17 recollection about the mechanism by which leagues
18 impose limitations on their teams' ability to convey
19 broadcast rights?

20 MR. COOPER: I object. I don't think
21 that's the proper way to refresh recollection. You
22 have to establish that he once knew and has forgotten,

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1 something before you can refresh his recollection.

2 MR. STEWART: I withdraw the question.

3 JUDGE VON KANN: Okay.

4 BY MR. STEWART:

5 Q Over on the next page, the last page of
6 this exhibit 9-X, the comments read "baseball urges
7 the Commission to reject the position set forth in
8 Tribune's comments and in accordance with its explicit
9 directions set forth in Section 325(b)(6)" -- that's
10 the provision we just read.

11 Returning to the quote, "to construe the
12 Cable Act as preserving the absolute right of
13 broadcast stations and copyright owners to freely
14 negotiate and enter into contracts regarding, among
15 other things, the exercise of retransmission rights."

16 Do you see that?

17 A Yes.

18 Q Now, let me round this out and introduce
19 as Exhibit 10-X, a copy of the comments of the
20 broadcasts to which those comments refer.

21 (Whereupon, the above-referred
22 to document was marked as NAB

1 98-99 Exhibit 10-X for
2 identification.)

3 Please feel free to review this document
4 to the extent you need to. I'm going to be directing
5 your attention to the second to the last page of the
6 document which is the recently adopted standard
7 provisions of baseball club broadcast contracts of the
8 Major League Baseball comments referred to.

9 Is this the page immediately before Mr.
10 Riley's signature?

11 MR. STEWART: Yes, it is.

12 JUDGE VON KANN: Focusing on the
13 retransmission consent section?

14 MR. STEWART: Yes, correct. Well,
15 actually, these are alternative provisions.

16 JUDGE VON KANN: Okay.

17 MR. STEWART: On the face of it.

18 JUDGE YOUNG: I think you should help the
19 witness.

20 (Laughter.)

21 BY MR. STEWART:

22 Q If you go to the very back of the very

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1 last page of the document --

2 A Oh, I see here. I see, I see, okay.

3 Q You see at the top it's entitled "Required
4 language for local broadcast contracts, revised April
5 15, 1992, page 5." I don't have any of the other
6 pages of that, whatever document this is excerpted
7 from because Tribune did not provide them in the
8 comments that it submitted.

9 A By required language, it's required by the
10 Tribune. I don't know what required means.

11 Q This -- if you look at page 11 of the
12 Tribune comments, you'll see that this page in Exhibit
13 A is according to Tribune, "consists of representative
14 provisions from recently formed contracts prepared by
15 program syndicators and Major League Baseball's
16 'required language for a broadcast contracts.'"

17 A Oh, I see.

18 MR. COOPER: And this sentence goes on to
19 say "all predating the Cable Act which prohibit the
20 retransmission of the subject programs or limit a
21 station's right to grant retransmission consent."

22 JUDGE VON KANN: And what is the question,

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1 Mr. Stewart?

2 By MR. STEWART:

3 Q The question is and I'm glad that Mr.
4 Cooper raised this, the provisions on retransmission
5 consent would say in one of two alternative provisions
6 begin "if during the term of this agreement rights
7 holder gains the right through legislative or
8 administrative action or otherwise, to grant consent
9 to cable system operators and/or other multi-channel
10 programming distributors for the retransmission of its
11 broadcast television signal, rights holder shall not
12 grant such consent with regard to the games broadcast
13 hereunder without the express written consent of
14 club."

15 It goes on to say, continuing the quote,
16 "it is understood and agreed that the granting of such
17 consent by club, shall be contingent upon the parties
18 hereto reach an agreement as to the compensation to be
19 paid to club in consideration of its consent."

20 A This doesn't surprise me.

21 Q Why not?

22 A Well, once you started to change the

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1 relevant competitive positions of two distributors of
2 programming in the market, then the supplier of the
3 program to these distribution outlets wants to be able
4 to come back and renegotiate the deal.

5 I mean if you have a situation in which
6 the broadcasters now can get a substantial amount of
7 additional revenue and that could occur in this case,
8 then there's no doubt that the program suppliers want
9 a share of that revenue. And if indeed, the carriage
10 in the retransmission consent leads to a different
11 economic competitive position between cable and
12 broadcasting in that market, they'd want to
13 renegotiate the deals, I guess. I mean I think that's
14 what's going on. I'm not sure.

15 MR. STEWART: Let me provide as
16 Exhibit 11-X, excerpts from CRT record and this again
17 may not be subject to official notice, but I wanted to
18 close the loop here because Tribune was arguing in its
19 comments that the FCC should not allow program
20 suppliers, in effect, to reach over the shoulders of
21 stations and control the exercise of retransmission
22 consent rights. Baseball was arguing that they should

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1 be permitted to enter any such contracts and here in
2 Exhibit 11-X is what the FCC said.

3 I have -- it's a very long opinion and I
4 have the full version here, but the second page of it,
5 of 11-X begins simply as consent contracts.

6 (Whereupon, the above-referred
7 to document was marked as NAB
8 98-99 Exhibit 11-X for
9 identification.)

10 BY MR. STEWART:

11 Q Have you had a chance to scan that?

12 A I just see paragraph 172 here.

13 Q If you look at 173 as it goes over on to
14 the next page, you'll see that the FCC, in effect,
15 decided in favor of the sports league request and
16 Motion Picture Association request to permit
17 contracts, permit the program suppliers, in effect, to
18 enter contracts with stations taking over the
19 retransmission consent rights.

20 A Renegotiate the contract.

21 Q To renegotiate or negotiate new contracts,
22 correct.

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1 A Yes.

2 Q Do you agree, Dr. Crandall, that if the --
3 if a sports league or sports team had the right under
4 contract that it had negotiated with the station to
5 take over the retransmission consent rights and
6 receive all compensation under any retransmission
7 consent agreement, and in fact, as the Tribune
8 attachment shows, specifically condition
9 retransmission consent on retransmission in certain
10 markets, that the sports league would be in control of
11 whether compensation was received for retransmission
12 consent?

13 A Under your hypothetical, I would have to
14 agree, but there's an important adjective and you said
15 "all." There's no reason to believe that the
16 renegotiation of these contracts would lead the
17 copyright owners, baseball, whoever else it is, to be
18 able to obtain all of the benefits from the additional
19 revenue potential of the station. It's my impression
20 that today the stations retain a substantial share of
21 revenues and may be going down because of competition
22 from broadcast satellites and from cable.

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1 However, they've always had the ability to
2 obtain a substantial share of the revenue for
3 themselves. So there's no reason to believe that the
4 renegotiation of these contracts would lead the
5 copyright owners to get all of the revenues from
6 retransmission consent.

7 What they want are clearly and what was at
8 issue here, was that they want the ability to get a
9 piece of the action prior to the expiration of their
10 contract at which point they'll be able -- they will
11 be able to negotiate it.

12 JUDGE GULIN: Mr. Stewart, I may be a
13 little lost and I want to make sure I understand
14 what's going on here.

15 You're suggesting that, in fact, under the
16 law in place in 1998 and 1999 that any copyright
17 holder of programming had the right to renegotiate
18 their contracts under retransmission consent, their
19 contracts with the station?

20 MR. STEWART: Had the ability to
21 renegotiate, through renegotiating their contracts
22 with the station to influence effect, collect

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1 compensation from any retransmission consent
2 negotiations that occurred.

3 JUDGE GULIN: Once a station agreed to
4 retransmission consent and say got compensation or
5 didn't get compensation, then any copyright holder can
6 then come back and say we want to renegotiate such as
7 an NFL or Major League Baseball and say we want to now
8 renegotiate our contract with you?

9 You're saying that is the law in 1998 and
10 1999 and I'm not sure that this witness has said that
11 it is or it isn't.

12 Do you know if that's the case?

13 THE WITNESS: I don't know if it's the
14 law, but keep in mind that the implication here --

15 JUDGE GULIN: Same page, with respect to
16 the law or is this all just hypothetical? That's
17 where I'm a little confused.

18 MR. STEWART: No, not at all. I believe
19 that it's not hypothetical and that in short, this
20 provision which reflected that condition on the 1992
21 Cable Act in that subsection 6 that we read permits
22 any program owner to negotiate with a station to take

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1 compensation to tell them they can't exercise, they
2 can't grant retransmission consent without their own
3 consent --

4 JUDGE GULIN: And there is no disagreement
5 about that.

6 MR. GARRETT: I didn't hear everything
7 that he said, but I would be curious to know whether
8 it is the position of the National Association of
9 Broadcasters that copyright owners, including sports
10 leagues, do have the right to insert one of these
11 clauses into their contract and that it is not
12 preempted by anything in the Communications Act here;
13 and in fact, whether it is the position of the
14 National Association of Broadcasters that these types
15 of contractual provisions are valid, that in fact,
16 they have been inserted in agreements, that other
17 broadcasters have not objected or refused to put them
18 in.

19 You're opening up a whole hornets nest of
20 issues here, about the position of the National
21 Association of Broadcasters on this I would find
22 illuminating.

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1 JUDGE VON KANN: Let me make a suggestion.
2 I think we're at the break time. It seems to me we
3 may have slid from interrogation of a witness into
4 early argument of the case which is fine, but let's
5 reslide back to where we need to be. You've been
6 about an hour and three quarters with this witness.
7 How are we coming on wrapping up?

8 MR. STEWART: That is essentially the end
9 of my cross examination.

10 JUDGE VON KANN: With respect to these
11 three exhibits, 9, 10 and 11-X, I assume you may wish
12 to move them for impeachment purposes?

13 MR. STEWART: I would like to move that
14 they be admitted as evidence under official notice and
15 I have certified copies of the comments filed at the
16 FCC to that end. That's with respect to the two
17 exhibits 9-X and 10-X and 11-X, I believe, does not
18 require -- is admitted for impeachment purposes.

19 JUDGE GULIN: I'm sorry, 11-X is?

20 MR. STEWART: Should be admitted for
21 impeachment purposes. Should be admitted into
22 whatever extent the public law was as well.

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1 MR. COOPER: I think with respect to 11-X
2 and 8-X, the two copies of law with the same -- I
3 don't think they need to be in the record and we don't
4 waive any objection to their being the proper law, but
5 to ease the burden, we don't have any objection under
6 that.

7 JUDGE VON KANN: Why don't we receive 11-X
8 as, in effect, official notice of something we can
9 take official notice of, subject to your checking this
10 is correct, a copy of the right version or something.

11 (The document, having been
12 marked previously for
13 identification as NAB 98-99
14 Exhibit No. 11-X, was received
15 in evidence.)

16 How about 9 and 10-X?

17 MR. COOPER: He is not a sponsoring
18 witness, so they would come in as -- we would have no
19 objection on impeachment only. If there's some other
20 basis, you're saying -- putting him aside --

21 JUDGE GULIN: He is suggesting official
22 notice, although these are comments.

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1 JUDGE VON KANN: Why don't I make a
2 suggestion that you all discuss this for a minute over
3 the break and then let us know when we come back what
4 position you'd like to take on it.

5 Let's take 15 minutes and resume at 12:08
6 or something like that.

7 (Whereupon, the proceedings went off the
8 record at 11:53 a.m. and resumed at 12:08 p.m.)

9 JUDGE VON KANN: Yeah. Let's wrap up
10 these exhibits, I guess. What's the --

11 MR. STEWART: Mr. Chairman, I would move
12 at this time to have them admitted for impeachment
13 purposes only.

14 JUDGE VON KANN: 9 and 10 X?

15 MR. STEWART: Yes. Right.

16 MR. COOPER: No objection.

17 JUDGE VON KANN: All right. So received.

18 (Whereupon, the document
19 previously marked as NAB98-99
20 Exhibits 9-X and 10-X for
21 identification were received
22 into evidence.)

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1 MR. STEWART: And that concludes my cross
2 examination.

3 JUDGE VON KANN: Okay. All right. Mr.
4 Hester.

5 MR. HESTER: Good afternoon, Dr. Crandall.
6 I guess we've just moved into the afternoon anyway. My
7 name is Timothy Hester. I represent the Public
8 Television claimants.

9 CROSS EXAMINATION

10 BY MR. HESTER:

11 Q Could I ask you to turn please to page 5
12 of your testimony, and in particular, I wanted to
13 direct you to Table 2 in the middle of the page.

14 A Yes.

15 Q And in this table, you show shares for
16 Public Television out of the Bortz Survey Results. Is
17 that correct? You show a share of 2.7 to 3.0 for the
18 three years in question?

19 A Yes.

20 Q And were you aware that there was an
21 adjustment that was made to the Bortz Survey Results
22 as to Public Television that was accepted by the panel

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1 in the 1990 to '92 proceeding?

2 A No, I'm not aware of that.

3 Q Okay. Let me ask you to --

4 MR. HESTER: Maybe this is actually a good
5 time to ask a procedural question. I'm going to ask
6 the witness a question about a few passages out of the
7 1990 to '92 opinion. I presume you all have your own
8 carefully dog-eared copies, but I'm happy to hand
9 copies up if that's helpful. And I presume we should
10 have one for the witness, but I had assumed you
11 perhaps didn't want to mark multiple copies as
12 exhibits during the proceeding.

13 JUDGE VON KANN: I think actually it would
14 be helpful.

15 MR. HESTER: Okay. So maybe that would be
16 helpful.

17 JUDGE VON KANN: Thank you.

18 MR. HESTER: Okay. I hope the parties
19 have their's, but if anybody needs one, let me know.
20 Should we mark this as an exhibit, or is simply to
21 have it as --

22 JUDGE VON KANN: Actually, I had been

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1 thinking of asking you all, and maybe this is as good
2 a point as any to do it. And I hadn't quite decided
3 on whose shoulders I was going to ask this, but I
4 would find it, as one member of the panel, very useful
5 to have a notebook which had each of the CARP or
6 tribunal reports that have dealt with these
7 distribution cases over the years. It would be very
8 handy for me to just have a compendium that had them
9 all. I don't necessarily think they have to be
10 exhibits. I think we can take official notice of it,
11 but just as a convenience device, it would be
12 wonderful to have a notebook that had them all in
13 there. And so frankly, I was getting to the point I
14 was going to discuss with my colleagues over lunch, on
15 whose shoulders we should make that fall, the
16 Copyright Office, or you guys, or whatever. Mr.
17 Garrett, do you have any thoughts on that?

18 MR. GARRETT: Well, if they would agree to
19 start supplying the water, we could supply the copies.
20 I just have a question as to what it is you're looking
21 for. We have a book that has all of the decisions
22 going back to the 1978, the decision in the 1978 case.

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1 We have also the opinions of the Court of Appeals in
2 these various cases.

3 There are Phase 1 decisions, and there are
4 also Phase 2 decisions. There are also sometimes
5 decisions, for example, on remand from the D.C.
6 Circuit, so there's a big -- there's a lot of material
7 there.

8 JUDGE VON KANN: Maybe what I think might
9 -- may I make suggestions as we're getting -- let us
10 discuss this over lunch among the three of us, and
11 then perhaps come back to you all with some
12 suggestion. I don't want to put an undue burden. My
13 initial reaction is I'm not sure we would need the
14 Phase II stuff, although I don't know if maybe we
15 would. But how about for just this morning's
16 purposes, let's just let him refer to whatever it's
17 going to be, the 1992 CARP report. I don't think we
18 have to mark it at this stage.

19 MR. HESTER: All right. Thank you.

20 JUDGE VON KANN: And we'll try after lunch
21 to give you some view about it.

22 BY MR. HESTER:

1 Q Dr. Crandall, what we've handed you is a
2 document that's the 1990 to '92 decision of the
3 Copyright Arbitration Royalty Panel, and the first
4 page of the document, just to identify it, is a letter
5 from the chairperson of that panel, Mel R. Jiganti,
6 J-I-G- A-N-T-I, dated May 31, 1996. Have you seen
7 this document before?

8 A Yes.

9 Q Okay. And if I refer you please to page
10 117, do you see there that in the middle of the page,
11 the panel recites adjusted numbers for Public
12 Television in the Bortz Survey of 6.1 percent, 6.3
13 percent, and 5.7 percent?

14 A Yes, I see that. That's Dr. Fairley's
15 adjustment of the PTV share.

16 Q Right. And then if I refer you back to
17 page 124, if you see the carry-over paragraph at the
18 top of the page, the last sentence of that carry-over
19 paragraph you see, "No party having presented any
20 alternative to Dr. Fairley's methodology, we accept
21 it for purposes of this proceeding." Do you see that?

22 A Yes.

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1 Q Okay. So I simply wanted to establish
2 that there was this adjustment to the Public
3 Television share in the Bortz Survey that the panel
4 accepted for purposes of the prior proceeding. And I
5 think you said before you were not aware of that
6 point.

7 A I was aware of this. I didn't realize
8 that's what you were talking about.

9 Q When you say "this", what are you saying?

10 A The Fairley, I didn't know Dr. Fairley's
11 name. I didn't remember his name, but I remembered
12 this discussion in the report. But it does not
13 correspond precisely to the number in my Table 2.

14 Q Right. The number in your Table 2 is -
15 and let me refer you back to that on page 5 of your
16 testimony - the number for Public Television you show
17 in there is before any adjustment to the Bortz
18 results. Correct?

19 A It is the award of CARP before the
20 Librarian did anything to it. It is a weighted
21 average.

22 Q No, I was -- I'm sorry. I was focusing

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1 you on the middle column where you show the Cable
2 Operator's Survey Share. Do you see that?

3 A Yes.

4 Q That number is the Bortz number before any
5 adjustments were made. Correct?

6 A Yes, I believe so. Yes.

7 Q Okay. And in fact, I mean, just to
8 absolutely confirm that point --

9 JUDGE VON KANN: There is no dispute as to
10 this.

11 MR. HESTER: No. Okay. All right. Fine.
12 Thank you.

13 MR. GARRETT: I just want to make sure I
14 understand. You're saying the top Bortz number is --

15 JUDGE VON KANN: Mr. Garrett, there is no
16 dispute that on page 5 of Dr. Crandall's testimony,
17 the middle column, it says Cable Operator's Survey
18 Share of the numbers from the Bortz Survey. I think
19 there's nobody disputing that.

20 JUDGE YOUNG: And then that gets adjusted.

21 JUDGE VON KANN: And that was adjusted by
22 the CARP Panel.

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1 JUDGE YOUNG: But there's a separate
2 award. The award may be different.

3 Judge von KANN: By the Librarian.

4 MR. HESTER: Yes. I'm sorry, Your Honor.

5 BY MR. HESTER:

6 Q Dr. Crandall, let me just ask just so
7 there's no confusion on this. The column that you
8 show in your Table 2 of Weighted Average Award, that's
9 the weighted average award after the final decision in
10 the 1992 case. Right?

11 A It is the weighted average award from the
12 panel, not the final Librarian's decision. The weight
13 average of the Basic and the 3.75 Fund.

14 Q Right. Okay. And because Public
15 Television did not participate in the 3.75 Fund, the
16 weighted average was less than the number assigned by
17 the panel as to the Basic Fund. Right?

18 A That is correct, because the 3.75 Fund had
19 a weight of about 25 percent.

20 Q Okay. And I simply wanted to confirm what
21 I think is evident from the numbers we've just gone
22 over. In your Table 2, you show what you identify as

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1 a surplus for Public Television, comparing it to the
2 original Bortz Survey shares. Right?

3 A Yes.

4 Q That surplus becomes a shortfall if you
5 compare it to the adjusted Bortz shares that we just
6 went through. Correct?

7 A Well, I'm not sure this is an adjusted
8 Bortz share. This is an adjusted PTV share, based
9 upon some methodology, which apparently was accepted
10 in that proceeding, to suggest that there's some value
11 to cable owners from Public Television signals that
12 they don't carry.

13 Q Well, you are aware, Dr. Crandall, that
14 the panel accepted adjustments to the Bortz shares.
15 Right?

16 A I'm aware that their final award did not
17 correspond to the Bortz shares. I don't know that
18 they were adjustments to the Bortz shares. They
19 provided an award which was in excess of the Bortz
20 shares, and that's exactly what's in my Table 2.

21 Q Okay.

22 A And they did it perhaps in part because of

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1 this procedure that Dr. Fairley used.

2 Q Well, maybe we're quarreling over
3 semantics. I simply wanted to establish that the
4 panel in 1990 to '92 case accepted an adjustment to
5 the PTV Bortz share.

6 A I think you're putting words in my mouth.
7 I did not say that.

8 Q Well --

9 A Table 2 says that in every case, they
10 provided an award which differed from the Bortz share.
11 By that reasoning, everything is an adjustment to the
12 Bortz share, I suppose, but all that table was
13 supposed to show was that they did not come out at the
14 Bortz shares.

15 Q All right. Let me ask it this other way
16 then. I'll ask it the other way. In computing this
17 supposed surplus for Public Television, you took no
18 account of the adjustment that was made to the Public
19 Television share, did you?

20 A No, I did not, because I did not attempt
21 to explain in Table 2 all of the reasons that the
22 panel might have used for reaching an award level

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1 different from the Bortz share. The purpose of Table
2 is just to show that indeed they did.

3 Q Okay. Now if we take the number that I
4 showed you from page 117 of the CARP opinion, where
5 they showed -- and I'm just going to take a year for
6 purposes of example so we don't have to spend our time
7 going through three years. But in 1991, the panel
8 showed an adjusted figure for PTV of 6.3 percent.
9 Right?

10 MR. COOPER: I object to the extent it
11 characterizes it as a panel -- are you saying Dr.
12 Fairley's calculation?

13 MR. HESTER: I think the witness and I are
14 on the same page here, Your Honor. If I need to go
15 back and spend more time on it, I will. Should I
16 clarify this again?

17 JUDGE VON KANN: Well, what is the
18 objection, Mr. Cooper?

19 MR. COOPER: I'll withdraw the objection.

20 JUDGE VON KANN: Okay.

21 MR. HESTER: Okay.

22 BY MR. HESTER:

1 Q At page 117, the panel shows the adjusted
2 number out of the Fairley results of 6.3 percent.

3 A Yes, that's right.

4 Q And the number you show in your Table 2 on
5 page 5 is 4.2 percent as an award to Public
6 Television. Is that right?

7 A Yes, that's averaged over the years, so
8 that's not just for '91, but go ahead with your --

9 Q Well, it was the same award across the
10 three years, wasn't it?

11 A Yeah. No, I'm -- that I'm not sure. We'd
12 have to go to the page where they actually printed out
13 the award. It's in here somewhere.

14 Q Okay. Well, I'm sorry. If you look at
15 page 143 --

16 A They're very similar.

17 Q You can see that -- your point is fair.
18 There's a slight difference if you average, but
19 they're very close numbers. Right?

20 A Yeah.

21 Q Okay. So if we look at these two numbers
22 simply again making perhaps an obvious point, but the

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1 actual award is 50 percent less than that adjusted
2 share for Public Television. Right?

3 A The actual -- I'm sorry. The actual award
4 --

5 Q Being 4.2 percent, the adjusted Bortz
6 number being 6.3 percent. A But the 6.3
7 percent applies to Fairley's result starting with the
8 Bortz Survey, adjusting the Bortz Survey for his
9 methodology. And then that only applies to the Basic
10 pool, whereas the 4.2 is for the weighted average of
11 basic and 3.75, so I think you've got to compare the
12 6.3 with 5.8.

13 Q 5.8 is what?

14 A 5.81 and 5.75 are the awards of the Basic
15 Fund to non- commercial television according to page
16 143 of this document.

17 Q Okay. So if I take your point, I'm simply
18 trying to establish that in your Table 2 where you
19 have shown a surplus, if we go back and we look at
20 what the panel actually found as the Public
21 Television, it comes out the other way. It's not a
22 surplus if you look at what the panel accepted as the

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1 Public Television.

2 A I'm not sure that the -- what the panel
3 accepted for Public Television is what they wrote
4 down, 5.81 or 5.75. They refer to the study by DR.
5 Fairley, and then later on point out they referred to
6 the fact that apparently it was not rebutted or
7 contradicted.

8 Q Well, they said they accepted it.

9 A Yeah. They accepted it as evidence, but
10 that does not necessarily mean that they were going to
11 give exactly that percentage.

12 Q Okay. Now let me ask you to look at the
13 -- in the middle of page 5, you say that -- right
14 above Table 2, you say that, "No other claimant group"
15 - you're talking here about JSC - "No other claimant
16 group received such a substantial dollar reduction
17 from its share in the Bortz Surveys." Do you see
18 that?

19 A Yes.

20 Q You would agree with me, I take it, that
21 in percentage terms, other claimant groups received a
22 larger reduction in their award vis a vis their Bortz

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1 share. Right?

2 A From a casual inspection of this, I would
3 have to agree with that.

4 Q Okay. You also would agree with me, I
5 take it, that the JSC award in the '90 to '92 case was
6 closer to its Bortz share than it had ever been
7 before.

8 A That's my recollection. And if that's
9 your's, I'll take your word for it.

10 Q Okay. Now let me ask you to turn to page
11 6, Dr. Crandall. You say that -- you conclude at the
12 very top of the page that the award to JSC should not
13 have been less than the royalty share reflected in the
14 Bortz Surveys. Do you see that?

15 A Yes.

16 Q Now I take it from what you've already
17 said that you know full well that the CARP looked at
18 many other factors aside from the Bortz data in
19 reaching all of these royalty shares.

20 A Yes.

21 Q Okay. So you recognize that the issue
22 presented in the last case was not simply or not

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1 whether any particular party would get precisely its
2 Bortz share.

3 A Well, the way it may have been framed by
4 the panel was not that, but as an economist I would
5 suggest to you that there were only two studies that
6 served as sort of polar cases for how this money
7 should be divided up, the Bortz Study and the Viewing
8 Study. And I would argue as an economist, the Nielsen
9 Study of Viewing is irrelevant and, therefore, that
10 absent any other information that would give you a
11 better handle on how a market would have allocated
12 this pool, that the panel should have used the Bortz
13 Study in toto.

14 Q Now well, let me ask you about that. There
15 were other pieces of evidence as to valuation
16 presented by different parties aside from the Bortz
17 Study. You're aware of that?

18 A Yes.

19 Q And it is not simply the viewing data.
20 There were other factors presented by different
21 parties.

22 A Yes, I believe that's correct.

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1 Q Okay. So that in fact, the decision about
2 whether the panel would give Joint Sports precisely
3 its Bortz number had to take into account the entirety
4 of the evidence presented on valuation, of which Bortz
5 was a part. Right?

6 A I suppose as a matter of law, that's true.

7 Q Well, and as a matter of the way the
8 evidence would be evaluated, it wouldn't simply be
9 whether you award a particular number or not to one
10 party. You have to look at the range of evidence.

11 A Well, to the extent that you conclude that
12 the Bortz Survey is the best available information on
13 the value of this programming, the share of the
14 budgets that cable systems would allocate to these
15 various types, but that you have some problems with
16 the Bortz Study. Then you would want evidence that
17 reduces or adds to the Bortz share based upon these
18 concerns. And what testimony says is, they didn't
19 provide any such justification. Why was the supply --
20 the fact that Bortz doesn't take into account supply
21 considerations, why is that a case for reducing the
22 Joint Sports share? It might have been a case for

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1 increasing it had they looked into it. The fact that
2 this survey was a 10 or 15 minute survey, and it
3 reflected the attitudes of the cable operators might
4 have meant that it was subject to some minor random
5 error, but it doesn't suggest any bias for adjusting
6 one way or the other.

7 Q Well, let me try to break that down a bit.
8 I simply, first of all, wanted to establish what I
9 think is common ground between us, that there are
10 other pieces of evidence on valuation aside from
11 Bortz, and aside from the Neilsen Study that were
12 presented in the last case. The panel looked at the
13 range of things.

14 A That is correct.

15 Q Okay.

16 A As a matter of fact, as an economist, you
17 and I could discuss these pieces of evidence and ask
18 whether they should have been used to add to or deduct
19 from the Bortz share.

20 Q And the panel, in fact, had some concerns
21 about the Bortz study, some of which you just
22 mentioned that cause it to give less than full weight

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1 to Bortz. That was the panel's judgment. Right?

2 A That was the panel's judgment, but
3 unfortunately, they did not back it up with a reasoned
4 analysis of why it should lead to some shares being
5 increased, and some being decreased.

6 Q And you also recognize, I take it, that
7 the panel in its opinion said it wasn't purporting to
8 summarize all of the evidence in the record, or to
9 discuss every piece of evidence.

10 A I don't recall that statement, but I'm
11 sure it's here.

12 Q Well, let me just -- so when you say on
13 page 6 that, "In your judgment the Joint Sports' share
14 should have been at the Bortz number", I take it
15 implicitly you're giving zero weight to the rest of
16 the evidence in the record.

17 A Not necessarily. I'm giving -- I'm
18 suggesting that in the record, and in the panel's
19 decision, there's no analysis where it suggests that
20 you would deduct from Bortz for certain categories,
21 and add to Bortz for other categories based upon the
22 infirmities or purported infirmities in the Bortz

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1 Survey.

2 Q Well, but my point is simply Bortz wasn't
3 the only piece of evidence, so your disagreement is
4 with any deviation from Bortz, and the question I'm
5 putting to you is, doesn't that inherently put a zero
6 value on everything else?

7 A Not necessarily, but what is not present
8 is why it was, if you go back to my Table 2, why it
9 was that the Bortz Survey says that the program
10 supplier share is 40 percent to 46 percent, and they
11 gave the program supplier 56 percent. Where did that
12 10 percent come from? It came from putting some
13 weight on the Viewing Study, I would suggest that was
14 a mistake from the standpoint of economics.

15 Q And tell me why you think that was a
16 mistake.

17 A Because the Viewing Study tells you
18 nothing about the willingness of cable systems to pay
19 for various forms of copyrighted material.

20 Q Why is that?

21 A Because their ability to obtain revenues
22 and net profits is not directly correlated, or is not

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1 a function directly -- solely of viewing, but rather
2 of the types of programs that are offered, and whether
3 they can obtain greater revenues from the sale of
4 subscriptions from adding those programs.

5 Q And why wouldn't that equate into programs
6 that are widely viewed?

7 A Well, it would certainly equate into
8 programs that are viewed, and there may be some minor
9 correlation there. But the viewing data itself
10 doesn't tell you anything about the willingness of
11 cable operators to pay, or the derived information
12 about the willingness of their subscribers to increase
13 their subscriptions to the cable system.

14 Q So putting it another way, in your view,
15 the viewing data doesn't tell you what kinds of
16 programs are valuable in terms of attracting and
17 retaining subscribers?

18 A By itself, no.

19 Q Now I take it you also recognized the
20 panel reached a different view on that issue.

21 A Well, they may have reached a different
22 view. They struck a compromise of some sort, but I

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1 think over time, as you suggest, the panels are moving
2 more and more towards the Bortz Survey, because I
3 think they recognize correctly that there's no
4 analytical basis for these subtractions and additions
5 from the Bortz Study. And perhaps this time around we
6 can hope that any analysis of the Bortz Study, and any
7 deviation from it would be justified by analysis of
8 information in the record.

9 Q I take it you would agree with me that
10 there are imperfections in the Bortz Study. You
11 couldn't look at it alone as a perfect measure of
12 value in this context, would you?

13 A Put that way, obviously, I'd have to agree
14 with you. It's obviously not perfect.

15 Q I was looking for agreement.

16 A Economists are often a little skeptical of
17 survey study. But as I pointed out, I don't know if
18 it was in answer to Mr. Stewart's question, data
19 obtained in other ways often has random errors in it
20 too. I don't claim to be knowledgeable about survey
21 research techniques, and I, myself, don't see any
22 particularly large problems with the Bortz Survey.

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1 Q Why do you say that, "Economists are often
2 skeptical about survey research"?

3 A Well, because it's often used to determine
4 the willingness of subscribers - excuse me - of
5 consumers to pay for something. And so, for instance,
6 I ask you how much is it worth to preserve the Grand
7 Canyon? You might answer anything under the sun. In
8 this particular case, these are cable operators who
9 were asked how would they come out in allocating a
10 budget, and so they were forced to consider a budget
11 constraint. Often the survey research for consumers
12 doesn't take into account the budget constraint, and
13 what you find is consumers saying they'd be willing to
14 pay more than their net wealth for something.

15 Q I wanted to ask you just one more small
16 question on your Table 2, page 5.

17 A Uh-huh.

18 Q Where you've calculated these dollar
19 amounts, you're working off of the point estimates in
20 the Bortz Survey shares for purposes of calculating
21 these shortfalls and surpluses. Right?

22 A Yes.

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1 Q And you haven't taken into account the
2 confidence intervals of the estimates.

3 A No, there's no standard deviation.

4 Q Dr. Crandall, are you also aware that with
5 respect to the claimant categories in the '90 to '92
6 case, that Sports was the programming category that
7 had the largest deviation between the Viewing Share
8 and the Bortz Share?

9 A Yes. I think that's right. I can't --
10 without looking at the numbers. I wouldn't be
11 surprised because if you look at other evidence,
12 you'll see that cable systems pay more per viewer for
13 sports-related programming than for other kind of
14 programming.

15 Q They pay more per program when -- let me
16 follow up on that last comment. You said they pay
17 more for sports programming. That's in relation to
18 programming on which they can run advertising?

19 A Some of it they may, but they pay huge
20 premium for ESP over some Nickelodeon, or something
21 like that. The ratio of what they pay to audience.

22 Q And they can run advertising on ESPN.

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1 Right?

2 A They probably can run advertising on some
3 of these other networks too.

4 Q Let me ask you about ESPN.

5 A I think that's right. I haven't looked at
6 it.

7 Q Okay. You say at page 10 at the bottom of
8 your paragraph 20, you say that the third arbitrator
9 rejected the concern about the supply side, and
10 supported a higher award for JSC that was more
11 consistent with the Bortz analysis. Do you see that?

12 A Yes.

13 Q I take it you recognize that the dissenter
14 in the prior proceeding still proposed an award
15 substantially below the Bortz share that you show in
16 your table.

17 A Yes.

18 Q And in fact, he only proposed one
19 additional percentage point for JSC. Is that right?

20 A Something like that.

21 Q So even the dissent didn't accept the
22 Bortz Survey in full as the only measure of value. Is

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1 that right?

2 A Apparently, but he discounts the supply
3 side effects entirely, so I'm not sure why. He
4 doesn't explain why he didn't give them the full Bortz
5 share.

6 Q So your critique is really focused more on
7 what the panel wrote, than on what they did?

8 A Well, the only way to understand what they
9 did is to have them explain to me why they did it. I
10 mean, they could have generated the numbers, you know,
11 randomly, but presumably, there's some basis for this.
12 And what I was trying to find out was why they
13 adjusted or why they offered shares which are
14 different from the Bortz Survey, and they don't really
15 explain it very well.

16 Q But your point in your testimony is you
17 think the dissent got it right?

18 A My point in my testimony is that I think
19 the dissent was closer to having it right. And he
20 discounted the supply side argument on the grounds
21 that this was a forced sale, it was a compulsory
22 copyright.

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1 Q Okay. Let me ask you to turn to page 13,
2 please. I'm sorry. Make it 12.

3 A Okay.

4 Q Well, I guess my question really covers
5 both of these pages, and something you said in your
6 direct testimony this morning. I believe you've
7 testified both in your written paper and earlier today
8 that you believe the free market to be simulated in
9 transactions between cable system operators and the
10 owners of the copyrighted programming that's being
11 carried on the distant signal. Is that correct?

12 A I think that's the best way to think of
13 it. As I testified, there could be intermediaries
14 there.

15 Q And so, in this market to be simulated,
16 the buyers that you would be focusing on are the cable
17 operators?

18 A Yes.

19 Q And you would recognize, I take it, that
20 cable operators follow a common pattern of purchasing
21 full channels of programming. That's the way they run
22 their business.

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1 A I think that's typically true, yes.

2 Q Cable operators aren't in the business of
3 buying individual pieces of programming, and
4 amalgamating them into a full 24 hour a day signal,
5 are they?

6 A They might do it on some channels, and
7 obviously they even program some channels. But for
8 the most part, they are downloading a basic cable
9 network or a premium cable network and offering it in
10 toto.

11 Q So let's just make that clear. A cable
12 operator will look for a full channel of programming
13 to fill the 24 hours of a day, and it might get that
14 channel of programming from a cable network. It might
15 get it from a local signal. It might get it from a
16 network signal, might get it from a distant signal,
17 all of these sources. Correct?

18 A Yes.

19 Q Can you give me any examples where cable
20 operators actually amalgamate programming build-up of
21 a 24 hour day by amalgamating the programming?

22 A Well, I can give you an example. On my

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1 own cable system there's a local news channel, Channel
2 8 on D.C., Comcast Cable System, where there's
3 periodically different insertions of programming that
4 they negotiate for and carry on that channel, that is
5 not simply the local newscast. Now I don't know if
6 they own -- they probably own that channel, and they
7 may pay copyright royalties to various people selling
8 them content for that channel.

9 Q But they don't build up a 24 hour day, do
10 they? Your point is they insert certain programming
11 into the day?

12 A Well, this -- again, I don't know who owns
13 this channel, but they do have local access
14 programming. In many of these cases, they may
15 actually participate in the assembly of the rights and
16 of the programming. But you're right, that for the
17 largest part of their channel offerings, they are
18 picking up an entire channel, and not mixing and
19 matching them themselves.

20 Q And so these cable operators are really
21 not in the business of negotiating directly with
22 owners of programming, are they?

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1 A They may be on certain occasions, as I
2 pointed out.

3 Q Pretty rare though.

4 A I haven't looked at that.

5 Q Well, let's take your example of Comcast,
6 which is maybe a nice counterpoint to the one I wanted
7 to ask you about. You recognize that a lot of Form 3
8 systems are much, much smaller than Comcast.

9 A Well, Comcast owns a -- it's a multiple
10 system.

11 Q Right.

12 A It may own some small systems. I'm talking
13 about the system in the District, which is, I suspect,
14 one of the larger systems.

15 Q Right. But if you think about cable
16 systems all around the country, Form 3 cable systems,
17 a lot of them are substantially smaller than Comcast.
18 Right?

19 A Smaller than D.C. Comcast, if you're
20 talking about systems. Comcast is a large multiple
21 system.

22 Q Right. And so, it would stand to reason

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1 that a number of Form 3 operators aren't going to be
2 in any position at all to have the infrastructure to
3 negotiate with different owners of programming to
4 build up a channel from scratch.

5 A I don't know it takes. I mean, it may be
6 they negotiate with local people who do have
7 copyrights and to whom they make payments. I don't
8 think you have to be terribly large to do that.

9 Q But in any event, you agree with me they
10 don't really do that as a norm today.

11 A I don't know they don't do it as a norm.
12 I agreed with you earlier that they don't do it on a
13 large share of their channels.

14 Q Okay. Now you're familiar with the fact
15 that the panel in the 1990 to '92 case rejected the
16 suggestion that there should be a market based on
17 negotiations between program owners and cable
18 operators.

19 A I don't think they rejected it. I'm
20 trying to find -- if you can find the page for me. I
21 cited in here, but I don't know what the page is. I
22 think -- as I pointed out earlier -- oh, here it is.

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1 Hang on one second and I'll answer your question.

2 Q Okay.

3 A Right. I got it.

4 JUDGE VON KANN: What page?

5 MR. HESTER: I can point you -- it's
6 footnote 4 in your written testimony, and there's a
7 sentence on page 7 in your written testimony, which
8 refers to page 23 to 24 of the CARP report.

9 THE WITNESS: Yes, and it talks about
10 operators that substitute for direct negotiation among
11 cable operators and copyright owners. And then later
12 on -- I had it earlier. I'm sorry, sir.

13 MR. HESTER: I could maybe -- do you want
14 me to point you to some of it, Dr. Crandall?

15 THE WITNESS: Yeah. But anyway, I think
16 later on they point out that there might be -- that
17 this is a simulation of a market between cable system
18 and the demand side, and the owners of programming on
19 the supply side. But you're right, they did talk
20 about initially a substitute for negotiations between
21 cable operators and distant signal broadcasters.

22 BY MR. HESTER:

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1 Q Right.

2 A I don't know that they rejected in saying
3 that there would be negotiation between cable
4 operators and the copyright owners directly.

5 Q Okay. Well, let me point you to the
6 middle of page 24. Do you see in the middle of that
7 page, CARP said, "Where the simulated market diverges
8 from the compulsory license system, and what we must
9 construct is the negotiations between the cable system
10 and the broadcast stations." Do you see that?

11 A I do.

12 Q And then also if you look at the very top
13 of that page, the panel says - and if you look at the
14 carry-over from 23, they pose the question as, "What
15 would the cable system have had to pay and be willing
16 to spend ... if, in fact, it had been 'required' to
17 negotiate with the broadcast station." Do you see
18 that?

19 A Yes.

20 Q And that's what you were referring to in
21 your testimony, in fact, when you said you didn't
22 agree fully with what the CARP said on this point.

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1 A NO, I said that I think of it more in
2 terms of negotiations between the ultimate owner, the
3 copyright owner and the cable system. And, in fact,
4 in the decision by CARP in the '90/92 case, in the
5 middle of that paragraph on page 24 they say,
6 "Further, we must hypothesize a situation whereby the
7 cable system negotiates not for a channel, such as
8 WTBS or TNT, but rather for an entire program
9 category, such as Sports programming, movies or public
10 broadcasting programming on a proportional basis."
11 That could imply more direct negotiation with the
12 owner of the rights.

13 Q Well, I recognize that passage, and I
14 didn't want to slide over it, but the description of
15 the negotiation that they were talking about is, in
16 fact, consistent with the way cable operators
17 negotiate today with cable networks when they're
18 bringing in a whole channel of programming. Right?

19 A Yes. As I mentioned earlier, there are
20 often intermediaries just to save transactions costs.

21 Q Now are you aware also that in the
22 satellite rate proceeding, the panel in that

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1 proceeding considered and rejected an argument by the
2 Joint Sports claimants that the negotiations in the
3 satellite context should be conceived as between
4 satellite carriers and copyright owners. Were you
5 aware of that?

6 A I read that decision, but I don't recall
7 that.

8 Q Okay. Let's see.

9 MR. HESTER: This report, Your Honor,
10 actually was previously marked as NAB 2-X. It may be
11 -- I really only had one question for the witness. May
12 I approach? Is it all right if I --

13 JUDGE VON KANN: Yes.

14 BY MR. HESTER:

15 Q Dr. Crandall, I hope you don't mind if I
16 just point you --

17 A Sure.

18 MR. GARRETT: I'm sorry. Do you have a
19 good copy of that?

20 MR. HESTER: You don't carry your NAB
21 exhibits with you?

22 MR. GARRETT: I burn them as soon as I get

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1 them.

2 MR. HESTER: Yes, we do have some more.
3 I'm on page 14 at the bottom, and footnote 17. I'll
4 let you look at it.

5 THE WITNESS: I've looked at it.

6 BY MR. HESTER:

7 Q And, Dr. Crandall, I just wanted to direct
8 your attention to the footnote there. You see where
9 it says, "JSC and the commercial networks further
10 assert that these negotiations would proceed between
11 satellite carriers as buyers, and copyright owners as
12 sellers." And then the panel says, "We agree that
13 satellite carriers would be the buyers, but
14 negotiations need not necessarily involve copyright
15 owners directly as sellers."

16 A I see that, and in response to your
17 earlier question, that doesn't suggest that they
18 reject a notion that it could take place that way.

19 Q Okay.

20 A It says, "not necessarily."

21 Q My word "rejection" was maybe a tad
22 strong, so I take your point. But the point I wanted

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1 to make is that in the satellite rate case, and in the
2 1990 to '92 CARP case, the market as described was a
3 market where the buyer is the cable operator, and the
4 seller is the distant signal.

5 A Well, all it says here is that it could --
6 it may or may not be. It's not necessarily directly
7 the copyright owner. It could be the signal in the
8 hypothetical market, or it could be the copyright
9 owner.

10 Q Do you see over on the next page, same
11 footnote, footnote 17, there's a clause, "The ultimate
12 re-transmission negotiations would likely transpire
13 between satellite carriers and broadcast stations with
14 no direct copyright owner involvement." Do you see
15 that?

16 A I see it.

17 Q Does that make sense to you?

18 A That's their conclusion. I think it makes
19 sense that in many cases there would be an
20 intermediary, and it might be the station, but it
21 could be directly with the copyright owner depending
22 upon the size of the copyright owner, and the amount

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1 of programming he had at stake.

2 Q Okay. I take it in terms of what you
3 discussed before with Mr. Stewart, you would agree
4 that for purposes of looking at any hypothetical
5 market, we need to look at one that does not involve
6 the sale of programming used to generate advertising
7 revenue.

8 A I'm sorry. For what purpose? I'm not
9 sure I understand your --

10 Q In other words, in looking at the value
11 and in looking at the marketplace to be modeled here,
12 we should not be looking at analogous marketplaces
13 where programming is sold for purposes of generating
14 advertising.

15 A Well, no. You might look for support in
16 those markets. You just have to take into account how
17 much of it is advertising. For instance, the fact that
18 cable owners pay huge fees to ESPN, you wouldn't
19 ignore, but you might want to back out the amount they
20 obtained in advertising revenues to get a net value.
21 But I wouldn't ignore it.

22 Q And I take it you'd also agree that if you

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1 were looking at the amount paid by ESPN for a
2 particular kind of programming, you'd need to back out
3 the fact that they generate a lot of advertising
4 revenue from that programming.

5 A If they do. You want to take into account
6 how they obtain their revenues, yes.

7 Q Okay. Because you really need to know, in
8 terms of assessing the value, you need to know how
9 that programming is used to generate value.

10 A Of course.

11 Q Okay. Let me ask you to turn to page 11,
12 please.

13 A 11 of?

14 Q I'm sorry. Your testimony in this
15 proceeding. Now this is where you talk about the 1990
16 to '92 CARP decision, and in particular, you offer
17 criticism here of what the panel said about what you
18 called "the supply side of the market." Right?

19 A Yes, in paragraph 22.

20 Q Right. But the panel didn't say that you
21 needed to look at sellers' motivations, did you? That
22 wasn't what the panel said in that part of its

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1 critique of the Bortz Survey.

2 A I say that in paragraph 22, "They appear
3 to suggest that the motivation of the seller might not
4 be captured in the Bortz Survey." That is, the
5 seller's willingness to sell the programming at a
6 specific price.

7 Q And that's what I wanted to drill down
8 into first. You bring the word "motivation" in. The
9 word "motivation" is not actually in the CARP
10 decision, is it?

11 A I don't recall. We'd have to do a search.

12 Q Well, let me point you to page 65. Do you
13 have that page?

14 A I do.

15 Q You see toward the bottom of page 65,
16 there's -- I think the key sentence you're focusing on
17 is this one, "While the operator may be willing to
18 spend a certain amount of its budget for a given
19 category of programming, the market supply may be at
20 odds with what the operator is willing to spend." Do
21 you see that?

22 A Yes.

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1 Q And from that, you read that as talking
2 about motivation. Right?

3 A No. I think the effect of the supply
4 side, the people offering the programming, is what I
5 was referring to. And, in fact, if you -- I don't
6 have the pages here or the language, but if you look
7 at the opinion on the devotionals, I believe they said
8 something about these people being willing to take
9 negatives prices; that is, pay for carriage, because
10 they were motivated by something other than pure
11 profit maximization. They were motivated by more
12 Evangelistic matters.

13 Q Well, I really wanted to focus first on
14 the question, when you say in your page 11 of your
15 testimony, "The panelists appear to suggest that the
16 motivations of the seller might not be captured by the
17 Bortz Survey." First of all, that's your construction
18 of this language. Right?

19 A Well, in part, but that's one of the
20 things that would drive the sellers, is motivation.
21 And they don't provide any analysis of why it is that
22 they think that the Sports claimants would be willing

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1 to sell their programming at low prices, and therefore
2 need a deduction, and the program suppliers would not,
3 who are selling, after all, reruns of syndicated
4 programming and movies that are played over and over,
5 why they would be less willing to take a low price, a
6 10 percent bump over Bortz.

7 Q Let me just ask you -- again, I simply am
8 trying to figure out, first of all, when you say
9 motivations of the seller, that's the way you
10 construed this passage in the whole opinion. That's
11 not in there per se, is it?

12 A It is not, and I said they appear to
13 suggest that.

14 Q Okay.

15 A I mean, that's one of the things that
16 would drive the seller.

17 Q Right.

18 A His motivation.

19 Q Right. I wanted to ask you about an
20 alternative way to read that language, and see if it
21 makes any sense to you.

22 A Which language now are we talking about,

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1 the language of the panel?

2 Q Yeah, the language out of the panel.

3 A Okay.

4 Q And I just maybe can illustrate it with an
5 example, and see if we can get to common ground here.
6 If you have a --

7 JUDGE VON KANN: Mr. Hester, can you just
8 pause a moment and let me -- I think we're going to go
9 into this, I'd like to read this passage. It'll take
10 me about a minute.

11 MR. HESTER: Sure.

12 JUDGE VON KANN: And I take it we're
13 talking about the section of the CARP report headed
14 "Observations Concerning the Bortz Study", which is
15 page 65 and 66?

16 MR. HESTER: Yes, Your Honor.

17 JUDGE VON KANN: Okay. Can we just take
18 a second?

19 MR. HESTER: Oh, sure.

20 JUDGE VON KANN: It is actually mainly
21 page 65 more than 66, I think.

22 MR. HESTER: Yes.

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1 JUDGE VON KANN: Because 66 talks about
2 the way in which the study was carried out.

3 MR. HESTER: Right.

4 JUDGE VON KANN: You're not focusing on
5 that at the moment.

6 MR. HESTER: Right.

7 JUDGE VON KANN: Okay.

8 MR. COOPER: He also referred to this
9 devotional claimant --

10 MR. HESTER: Well, I object to that.

11 JUDGE VON KANN: All right.

12 MR. HESTER: I mean, I really do object to
13 that. It is my cross examination.

14 JUDGE VON KANN: Well, let me just read
15 these two pages. Okay. I'm up to you.

16 MR. HESTER: Okay. I just wanted Dr.
17 Crandall to take an example to see if there's another
18 way to think about this passage, where the panel says
19 it doesn't take account of the supply side. The point
20 I wanted to make is this. If you have a signal,
21 assume this box is my signal - okay? It's just my 24
22 hours a day, and it has different categories of

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1 programming, and it's got Category A, B, C, D, and E
2 down here. Okay? And just take -- just to help walk
3 it through, these are the categories of programming
4 that are on the distant signal. And then when one
5 goes to the operator, the operator says well, I would
6 allocate, you know, 75 percent to A, and the balance
7 to E, let's say.

8 THE WITNESS: Can I ask you a question
9 about your chart so we understand each other?

10 MR. HESTER: Sure.

11 THE WITNESS: The right-hand side is a bar
12 chart showing the breakdown of dollar values of
13 payments or time?

14 MR. HESTER: It's the percentage
15 allocations value in the Bortz Survey.

16 THE WITNESS: In the Bortz Survey.

17 MR. HESTER: Okay. And A, and this column
18 is the distant signal.

19 THE WITNESS: Okay.

20 MR. HESTER: Okay?

21 THE WITNESS: All right.

22 MR. HESTER: And this is just to

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1 illustrate a point.

2 BY MR. HESTER:

3 Q You recognize, I take it, that the
4 composition of the programming in the distant signal
5 is set by the broadcaster.

6 A It's set by negotiations between the
7 broadcaster and the supplier of programming.

8 Q Right. But it's by negotiation in the
9 current world. It's not set by negotiation between
10 the cable operator and the distant signal.

11 A Not directly, no.

12 Q Well, not indirectly either.

13 A Well, if, in fact, the copyright royalties
14 are large enough to the various programming factions,
15 it may not be in this case, they might negotiate
16 differently to get on the independent distant signal
17 or the superstations. It could have feedback effects.

18 Q Well, okay. You recognize, for instance,
19 that the copyright royalties paid in this proceeding
20 are a very small fraction of the total programming
21 compensation that flows to owners of copyrighted
22 programming in this country.

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1 A I think that's right.

2 Q Okay. And you also recognize that in the
3 current environment, the distant signal itself
4 receives no value from the distant signal
5 re-transmission, except in so far as it generates
6 additional advertising.

7 A Well, if it generates additional
8 advertising it might have an effect. I mean, again,
9 there may be feedback effects in this negotiation with
10 its suppliers. I don't know.

11 Q But by virtue of the way the compulsory
12 license works in today's environment, the mix of
13 programming set by a distant signal is going to
14 reflect its judgment about the programming mix that
15 maximizes its revenues in an advertising-based model.
16 Right?

17 A Yes, in part, but also there's a supply
18 effect here. And there may be -- if, in fact, there's
19 a substantial -- as I mentioned, a substantial amount
20 of revenues flowing back from the importation of
21 distant signals to the copyright owners, they may
22 change their negotiating patterns too.

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1 Q Well, but that statement you just made is
2 counter-factual. Right? In today's world, the amount
3 of money that goes back to copyright owners from the
4 compulsory license is not going to be enough to cause
5 them to modify their negotiations with distant
6 signals, is it?

7 A It probably isn't going to have a major
8 effect on average around the country. It could have
9 on some signals.

10 Q Okay. Only on the superstations?

11 A Probably.

12 Q Okay. And so a lot of the distant signals
13 we're talking about in this proceeding are not even
14 ones that are carried as superstations. Right?

15 A Right.

16 Q Okay. But the point I'm trying to make is
17 that in today's world where we have a distant signals
18 that generate their revenue out of advertising,
19 they're going to decide on the mix of these signals A
20 through E, mix of programming Categories A through E,
21 based on their judgment about where they make the most
22 advertising revenue. That's the way the distant

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1 signal would set its mix of programming.

2 A That's the way the broadcasters' interest
3 is in maximizing his net revenues.

4 Q Okay. And now you have a cable operator
5 that's bringing the signal into its system. And that
6 cable operator, unlike the distant signal, generates
7 zero revenue from advertising. Right?

8 A From the distant signal, yes.

9 Q Right. Just focus -- you're right. Just
10 focusing on the distant signal. So you have this
11 situation where there's a divergence between the
12 decisions made by the entity that sets the mix of
13 programming, which is the distant signal, versus the
14 decisions made by the entity that decides to bring the
15 distant signal into its particular system via
16 re-transmission. Right?

17 A You do, and there's no -- and at this
18 point, it's difficult for that feedback on the
19 programming decision of the independent station to
20 have an effect. But I guess what you're saying then
21 is that the dissenter in this case had it right; that
22 is, this is, after all, a compulsory licensing scheme

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1 for a given distribution of programs, and you don't
2 need to worry about the supply effects.

3 Q Well, I don't know how you got there from
4 my question, but I was just focusing kind of narrowly
5 on -- and then isn't it quite possible you could have
6 a situation where you have a bunch of cable operators
7 who are saying I would just love if the distant signal
8 would give me more of A. I just really want A. A is
9 what I really want, but the distant signal doesn't
10 carry as much A, as what the cable operator wants,
11 because the distant signal has different motivations.

12 A It's possible he'd say that, but when he's
13 asked the question, he's asked for those signals, how
14 would he allocate them, given what they offer him?
15 And, therefore, this fixed carriage, how would he
16 allocate his budget for buying that mix of
17 programming.

18 Q But isn't one way to read what the panel
19 was talking about when they talked about supply side
20 considerations, is this phenomenon where the operator
21 could want, want, want all day long. The cable
22 operator wants much more programming than is, in fact,

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1 available as a supply in the distant signal
2 marketplace, because the distant signals are not
3 motivated by the same considerations that cause the
4 cable operator to want particular categories of
5 programming.

6 A I don't think so. I think if you're going
7 to hold that Signal A, B, C, D, E in the right bar
8 constant, then the supply consideration simply goes
9 away. If, in fact, supply has an affect here, can
10 have an affect by different offerings of programs at
11 different prices and a different equilibrium. It's
12 very hard to imagine how you hold the quantities
13 constant.

14 Q Because you don't get to an equilibrium in
15 this market, because there isn't the -- in the current
16 world, under the current compulsory license, there is
17 no way equilibrium, there's no incentive for
18 equilibrium between the distant signal decision-
19 making, and the cable operators' decision-making about
20 what it wants.

21 A Well, even if we agree that there's no
22 feedback, there's still an equilibrium. The

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1 equilibrium is the one, your right-hand column. Those
2 are the quantities. It doesn't affect those
3 quantities, and the cable operator is asking given
4 those quantities, how much of your budget do you think
5 you'd have to spend to get those in direct
6 negotiation, for just those quantities? And that's
7 the answer he gave you. There's no supply effect to
8 worry about.

9 Q Well, I don't disagree with it, but my
10 point is, the panel could have been talking about
11 something other than motivations of sellers. It could
12 have been talking about the fact that the distant
13 signals aren't going to supply the amount of
14 programming that the cable operators are allocating to
15 different categories.

16 A Well, I don't -- I guess I don't agree. I
17 think what they are talking about is saying that for
18 the quantities A, let's say, the price that the
19 copyright owner would demand is much higher than that
20 area suggests and, therefore, they would never reach
21 a deal. That's one possible way to explain it. In
22 another case of devotionals, let's call them D, that

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1 the devotionals would give the stuff away, and so
2 therefore, that area goes to nothing. It's a straight
3 line. It's not an area at all. I think that's what
4 they're talking about. It's not clear what they're
5 talking about, but the final point is, they never use
6 this analytical insight to adjust the Bortz numbers.
7 They simply say it doesn't take into account supply
8 considerations. And then later on we find out they've
9 adjusted someone up 10 percent, and someone down 6
10 percent, but they haven't tied it to the supply
11 consideration.

12 Q Right. I guess, I recognize that's your
13 critique of it. I'm trying simply to suggest that the
14 issue here in this proceeding, and the complexity of
15 the market valuation is not simply the motivation of
16 the sellers of individual categories of programming.
17 There's the further complexity that you have the
18 motivations of the distant signal that diverge from
19 the motivations of the cable system.

20 A The motivations of the economics, yes. But
21 the -- I agree with you that it is not simply
22 motivation, but because the best example of the panel

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1 actually taking into account supply effects, the
2 devotionals, is based upon motivation; that is, these
3 people are not maximizing net profits, they're
4 maximizing souls.

5 JUDGE VON KANN: That sounds like a good
6 place to stop for lunch. Is this an all right place,
7 Mr. Hester?

8 MR. HESTER: Yes, it's fine, Your Honor.

9 JUDGE VON KANN: All right. Why don't we
10 break and resume at 2:10.

11 (Whereupon, the proceeding in the
12 above-entitled matter went off the record at 1:12 p.m.
13 and resumed at 2:12 p.m.)

14 JUDGE VON KANN: We were talking a little
15 bit over lunch, and there is two or three sort of
16 administrative matters that are floating around here
17 that we probably would like to take up with you all
18 this week, but I am thinking that it might be better
19 to defer it.

20 First of all, we have got -- we want to
21 finish Dr. Crandall, and then you have another expert.
22 Maybe -- it sounds like Wednesday may be a little

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1 lighter day than Monday and Tuesday, and I am thinking
2 that maybe right after lunch on Wednesday that we
3 would talk to you about three things that I am aware
4 of.

5 One is this sort of continuing issue of do
6 we need to do anything about the fact that some of the
7 direct cases refer to percentages of the whole, and
8 some of them refer to percentages of less than the
9 whole, and what do we have to do about that.

10 Number 2, the issue of the designated
11 testimony, and the fact that a number of parties have
12 designated quite a bit of prior testimony, and how are
13 we going to handle that.

14 And a third issue is what we were talking
15 about a moment ago, perhaps getting a collection of
16 the relevant CRT and CARP reports, and Librarian, and
17 D.C. Circuit, but how much of that do we really need.
18 Do we need the stuff with respect to all six prior
19 proceedings, or maybe only certain ones, and I think
20 it might be worth talking about that, too.

21 So why don't we put all of that on the
22 agenda for Wednesday after lunch when we perhaps will

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1 have a little less of a pressed schedule. Yes, sir

2 MR. MAUSE: Your Honor, this is Philip
3 Mause, representing the Music claimants. In talking
4 about the percentages as a whole, and I know that we
5 want to get moving, but an issue -- somebody had
6 talked about an issue which was a cousin of the issue
7 that you raised, and this one might be a nephew or an
8 illegitimate child. I don't know.

9 But a number of the parties cases, and I
10 think the NAD case explicitly says they are dividing
11 the whole, except for whatever goes to music, because
12 music is a program element rather than a program type.

13 But we would also like some clarification
14 as to whether the parties represent program types
15 here, types of programming, are allocating a hundred
16 percent of everything, or a hundred percent of what
17 goes to program types after some amount is set aside
18 for music. That is a program element.

19 JUDGE VON KANN: Well, I think that is a
20 relative of some sort of the issue, and so let's put
21 that on the agenda on Wednesday as well if we can.

22 MR. MAUSE: All right. Thank you, Your

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1 Honor.

2 JUDGE VON KANN: Mr. Garrett.

3 MR. GARRETT: I would also suggest that we
4 also put on the agenda an issue that you raised at the
5 outset, Judge Kann, and that is the settlements that
6 we have here with NPR and the Devotional claimants. I
7 think that we should probably be able to take that on
8 Wednesday, and by putting it on the agenda pushes all
9 of us to devote some attention to it.

10 JUDGE VON KANN: Okay. I think that on
11 the first day, we had counsel here for the Devotional
12 claimants at least, who as I remember said that he was
13 happy to have that put in the record, but he would
14 like to have some discussion with you all about how
15 that is done.

16 So I don't know if you have gotten back to
17 him or not, but maybe between now and Wednesday, you
18 could talk with him and there would be some consensus
19 on what the best way to do it, and perhaps NPR as
20 well.

21 MR. GARRETT: He has made a proposal that
22 he sent around to the rest of us, and the rest of us

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1 have not gotten together to talk about it and see
2 whether or not it is acceptable, and we have not
3 gotten back to him.

4 But that's why I think if we put this down
5 on the agenda, we will have that taken care of.

6 JUDGE VON KANN: Okay. Let's add that,
7 too. Anything else? I don't want this to get too
8 large. I think we have enough there probably. Okay.
9 Mr. Hester, you are back on.

10 CROSS-EXAMINATION (Continuing)

11 BY MR. HESTER:

12 Q Okay. Dr. Crandall, I wanted to talk a
13 bit about the relationship between value of different
14 types of programming and the amount that cable
15 operators have to pay in compulsory license fees.

16 I take it that you would agree with me
17 that the value of particular signals of programming
18 could readily exceed the amount that a cable operator
19 has to pay as a compulsory license?

20 A Yes, and particularly those who take more
21 than one are likely to, and for marginal ones that may
22 be worth more than they had.

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1 Q What do you mean by that, operators that
2 take more than one?

3 A Well, in every market, and certainly a
4 downward one, you and I consume up to the point where
5 a marginal benefit to us is equal to marginal costs,
6 and, all those earlier units of consumption had
7 greater marginal benefits than the marginal costs, and
8 that's what I am referring to.

9 Q And in particular these relationships
10 reflected in the compulsory license were established
11 by statute back in the late '70s; is that right?

12 A Yes.

13 Q And so when a cable operator confronts a
14 decision to day about whether or not to take a
15 particular distant signal, it could readily been seen
16 that the value of that distant signal to the cable
17 operator could be far in excess of what it has to pay
18 to get that particular signal?

19 A It could be.

20 Q I want to now take you through an example
21 just to talk about that a bit more. Just for
22 simplicity, let me take an example of three systems --

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1 I'm sorry, three signals, A, B, and C, carried by a
2 cable system.

3 And let's make the first column the pay
4 in, and assume that under the way the license fees are
5 set, for Signal A the system has to pay 12; and for
6 Signal B, it has to pay 8; and for Signal C, it has to
7 pay 4, okay? And then the value --

8 MR. COOPER: Can I just object? I think
9 that this goes beyond the scope of the direct.

10 JUDGE VON KANN: Well, let's see, what in
11 the direct do you think this relates to, Mr. Hester?

12 MR. HESTER: It relates to the witness'
13 discussion about at the bottom of seven, and over the
14 top of eight, the witness talks about a competitive
15 environment would compensate copyright reporting to
16 the copyright's marginal contribution to cable system
17 net revenues.

18 And then he talks in the next paragraph
19 about determining this market value for specific types
20 of programming is difficult, and speaks about
21 estimating a hypothetical market, and it seems to me
22 that in relation to estimating that hypothetical

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1 market, we need to talk about what cable operators
2 actually pay, versus the value of the programming that
3 they receive.

4 JUDGE VON KANN: We will allow some leeway
5 here and see if it appears to get to that part of the
6 direct.

7 BY MR. HESTER:

8 Q Okay. And then if you take a value for
9 Signal A, and assume the value of Signal A is 15, and
10 assume the value of Signal B is 25, and assume the
11 value of Signal C is 20. And can you see those
12 numbers?

13 A Yes.

14 JUDGE VON KANN: Excuse me, but I can't.

15 BY MR. HESTER:

16 Q Now, you can see in this simple example
17 the pay-in in all respects fits. I am asking you to
18 assume here that these pay-in figures are set by
19 statute, and you can see in this example that in
20 varying degrees the value can exceed at different
21 percentages the amount that the operator has to pay to
22 get the signal. Does that make sense to you?

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1 A Yes.

2 Q And that in fact is presumably what we see
3 going on out int he real world today, because the
4 compulsory license doesn't vary according to the value
5 that the cable operators actually receive.

6 A Well, what it varies by is subscriber base
7 and revenue base, and so to some extent it does.

8 Q But the per subscriber price is set by
9 statutory framework and then he could see a value that
10 is far in excess of what he has to pay?

11 A Yes.

12 Q So in this context, we might even call the
13 compulsory license somewhat like an access fee to that
14 kind of program? I don't mean to use -- if I am using
15 jargon, tell me.

16 A Well, it is a price that the law demands
17 that he pay for those signals.

18 Q Okay. And then if we look at this in
19 terms of an award, and if we did the award based on
20 the percentage of value -- well, let me back up. The
21 amount paid in in my simple example, is going to be
22 24, right?

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1 The total value of these three signals is
2 going to be 60, okay?

3 A Right.

4 Q So you can see in my simple example that
5 the value here is 25 percent, and the value of Signal
6 B is 41 percent, and the value of Signal C is 33
7 percent. So just in looking at Signal C, 20 is a
8 percent of 60, okay?

9 And then if we have -- we know how much we
10 paid in, and that is our 24, and so we come up with
11 the awards. If we did an allocation of awards based
12 on value here, would you agree with me that the awards
13 would be 6, 10, and 8, simply taking 24, 25 percent of
14 the amount paid in becomes 6.

15 And 41 percent of the amount paid in, 10;
16 and 33 percent of 24 becomes 8, right? So you can see
17 that in --

18 JUDGE VON KANN: Could we get a response
19 to the right?

20 MR. HESTER: I'm sorry.

21 THE WITNESS: The fact is that because of
22 the schedule of copyright payments in the law, you

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1 can't say that he paid 12 for A and 8 for B. What you
2 can say is that if he buys one, he pays 12; and if he
3 buys a second one, then he pays 20.

4 But either one of them could be considered
5 marginal signals, and so he is not paying 12 for A and
6 8 for B. He is paying 20 A plus B the way that the
7 thing works out. I mean, we have the problem of unit
8 DSEs and fractional DSEs that could complicate this a
9 bit.

10 BY MR. HESTER:

11 Q Okay. So your point is that if he took A
12 as his first signal, he might have had to pay 12, and
13 if he takes under my simplifying example, if he took
14 A and B, he pays 20?

15 A Yes. There is on first or second signal.
16 He either takes 1, 2, or 3 in this case.

17 Q I guess what I am getting at is that I am
18 just asking you to assume for purposes of this example
19 that the operator is able to say, well, this is my
20 first, and this is my second, and this is my third.

21 In other words, we can see how much was
22 paid in. I recognize your point, but I want you to

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1 take it to illustrate something else. You can see in
2 this example that the total awards come out to 24,
3 right?

4 A Right.

5 Q And yet the difference between the pay-in
6 and the award can be different, depending on the
7 relationship between the value and how much paid in.
8 In fact, signal -- for signal A, the award would be
9 less than the amount paid in based on the relative
10 value. Does that make sense?

11 A No, it doesn't again, because the problem
12 is that what he has paid is 24 for all three signals.
13 He pays four for the third signal, and it could be A,
14 B, or C.

15 Q Okay.

16 A So you can't allocate his pay-in in that
17 fashion, any more than when you buy minutes on your
18 cell phone that you can say once you go over that,
19 that any one minute costs you more. It was all those
20 infomars on minutes that led you to have to go over.

21 Q Okay. Well, let me take another
22 simplifying example here. You can see that the values

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1 here, the values exceed the amount that has to be paid
2 in, correct?

3 A Correct.

4 Q And that is exactly what you expect in the
5 marketplace. That is what you would expect to be
6 happening, that the value of the distant signals
7 coming in exceeds the amount that the operators pay in
8 license fees, correct?

9 A That is correct. That is what market
10 system does. It generates surplus to the
11 participants.

12 Q And then you would also agree with me that
13 depending on how the value is allocated between those
14 signals that you can have more or less of a divergence
15 between the amount paid in with respect to different
16 signals, in terms of allocating the award based on
17 value?

18 A Well, what you have is this guy paid 24
19 units, whatever they are, for all three signals, and
20 on average he paid eight for each one, and in some
21 cases he had a huge surplus, and in other cases a
22 smaller surplus.

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1 But you can't assign the payments by
2 themselves to any one signal unless you change the
3 copyright schedule.

4 Q Okay. Well, let's take your point. If
5 the average is eight, your point is that is the
6 average of the pay-in, right?

7 A Yes.

8 Q And you can see given the differences in
9 value that if you assign awards, if you allocated the
10 pool paid in based on value, that the amount assigned
11 as an award to different owners of those signals could
12 be higher or lower than the amount that the cable
13 operator paid in to get them?

14 A Oh, sure, and it is true throughout, and
15 as I said, all you established is that there is some
16 surplus going to someone here, and that is true in
17 almost any market. That's why people are in business
18 to exploit some of that surplus.

19 Q And so, for instance, we wouldn't
20 necessarily say -- and I recognize your point that the
21 third signal is not -- that you can't necessarily
22 assign a lower number to it.

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1 A Right.

2 Q But if you have an example where the cable
3 operator had some way to assign a lower value to the
4 third signal, or if you knew for some other reason
5 that there was a lower value paid in for the third
6 signal, that doesn't necessarily equate to a lower
7 value in terms of what would be paid out as an award
8 does it?

9 A Well, in a hypothetical marketplace it
10 does. I mean, presumably, what these guys are giving
11 you is a measure of how they think their budgets would
12 be allocated in this market, and in a hypothetical
13 market, all these programs compete with one another
14 until the marginal value of an expenditure in any one
15 of them is equal to its marginal costs. In other
16 words, a dollar is worth a dollar.

17 Q Yes, but the marginal cost doesn't rise in
18 the current market does it because it is set by
19 statute?

20 A That is correct. As he adds more and more
21 signals, the rates will go down in step functions.

22 Q Right. So you don't really have a market

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1 function in terms of the amount paid in by the cable
2 operator?

3 A He is operating in the market, and he
4 decides how much to buy given that the prices are set
5 externally by the compulsory copyright.

6 Q Right. Right. And maybe I should have
7 been clearer on this point. When I put this column of
8 the award, the award of course is not going back. The
9 award doesn't go back to the cable operator, the pay-
10 in in value. These are the relationships that the
11 cable operator sees. The award would go back to these
12 three signals in my simplifying example?

13 A Yes, it is their homogeneous signals.

14 Q And so you could have a situation where
15 the cable operator sees a value in a particular
16 category of programming such that the award back to
17 the signal C could be substantially greater than the
18 value -- I'm sorry, could be substantially greater
19 than the amount paid in for signal C, and that would
20 make sense to you?

21 A That's right. We have been over this
22 before, but the first signal C could be signal A.

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1 Q I'm with you.

2 JUDGE GULIN: Are you finished with this
3 subject now?

4 MR. HESTER: Yes.

5 JUDGE GULIN: Okay. So just to clarify.
6 What you are saying I think, and I think you are
7 agreeing with Mr. Hester, and saying that if we were
8 able to identify all of the royalties that were paid
9 into the pool that were attributable to Public
10 Television distant signals, that doesn't necessarily
11 mean that the value we allocate to Public Television
12 cannot rise above that number?

13 THE WITNESS: Oh, yes, and there is -- I'm
14 sorry.

15 JUDGE GULIN: It can rise above that
16 number, and the amount that we allocate to Public
17 Television can be higher than the amount of royalties
18 which are attributable to the carriage of the Public
19 Television distant signals; can we or can't we?

20 THE WITNESS: No, I don't think -- well,
21 I don't think based on anything in this record that I
22 know about that you could do that. The board survey

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1 gives you estimates of value.

2 JUDGE GULIN: I am just saying as a
3 hypothetical, as a theoretical matter, based upon what
4 has just been put up on the board right now, and
5 forget about what the other studies show.

6 THE WITNESS: Right.

7 JUDGE GULIN: I am just saying
8 theoretically speaking are we limited to allocating
9 public television claimants the amount that has been
10 paid in to the pool attributable to the carriage of
11 public television distant signals?

12 THE WITNESS: Well, the problem is that
13 you can't attribute -- in cases where they are
14 importing more than one distant signal, you can't
15 attribute -- the parts of that, one signal or the
16 other.

17 You have one distant signal, 1-1/4, or 1-
18 1/2, 1-3/4, and the sum of those distant signals gives
19 you the copyright payment schedule, but you can't
20 attribute any piece of that to any one of those
21 signals.

22 Any one of them is at the margin, and the

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1 choice of the cable system is does he incur that
2 additional cost, whatever the copyright schedule says,
3 and is that cost less than the value at the margin of
4 any one of those signals, A, B, or C. You can't
5 attribute it.

6 If, for instance, one of those is a 1-DSE,
7 the other is a .25, and the third one is a .25, and he
8 owes for 1.50 DSEs. And you can't break that down
9 between A, B, and C.

10 At the margin, he has decided that every
11 one of them is worth at least .25 of a DSE, or
12 whatever cost; 1, or a .25, or a .25. The only case
13 where you can is where he has only brought in one
14 signal, and in that case -- or one signal above his
15 minimum payment for 1-DSE, then you can.

16 JUDGE GULIN: Well, I accept that is the
17 case, and that it really can't be done.

18 THE WITNESS: Right.

19 JUDGE GULIN: What if it could be done?

20 THE WITNESS: Well, if there were specific
21 payments attributable to specific kinds of signals
22 that could be identified, and it wasn't whether you

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1 brought in another one like it, then perhaps you would
2 have a possibility.

3 BY MR. HESTER:

4 Q Even though it is a compulsory license?

5 A If in fact the compulsory -- well, in the
6 first place, our hypothetical starts out with the
7 assumption that these are sort of homogeneous signals.
8 If they were three homogeneous signals, and let's say
9 A is a sports channel, and B is a the devotional
10 channel, and C is the public television channel, and
11 there are specific copyright royalties for each type
12 of channel, then it is a cake walk as to how much work
13 you have to do, and they only take one of each.

14 JUDGE GULIN: Even though it would be set
15 by statute, and not based upon a free market
16 valuation, the royalties for each signal?

17 THE WITNESS: Well, in each case, they are
18 distinct products, and the copyright or the cable
19 system has a decision to make for distinct products
20 and distinct fees for each one of those products. I
21 would think that that would be a fairly simple issue,
22 yes.

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1 BY MR. HESTER:

2 Q Well, let me go back to that though. I
3 think we agreed at the outset that the value for a
4 particular kind of channel carried could be
5 substantially greater than the amount paid as a
6 compulsory license fee?

7 A Yes.

8 Q And in fact the relative value for one
9 particular kind of channel could be substantially
10 higher in relative terms than the value of the other?

11 A Sure, there could be different relative
12 valuations of different kinds of signals --

13 Q And if you are doing a determination of
14 awards based on relative value, you can't rely on the
15 amounts paid in to figure out what the award should be
16 based on relative value can you?

17 A No, and I don't think any of it is. You
18 apply those relative amounts to the total pool.

19 Q Well, let me just go back and make sure
20 that we are on the same page here, because I am not
21 sure. If we assume in the aggregate that commercial
22 signals account for 96 percent of the pool, and Public

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1 Television signals account for 4 percent of the pool,
2 and I recognize your point that you think you can't
3 figure those numbers out.

4 But let's say that we can't, taking Judge
5 Gulin's point. And let's say we knew that the value
6 -- we knew that the total royalty pool paid in was
7 120, and that's how much was paid to carry these
8 commercial signals in Public Television signals in the
9 aggregate, okay? Are you with me so far?

10 A Yes.

11 Q Okay. And we know that cable operators in
12 the aggregate say that those signals to me in the
13 aggregate have a value of 200 million, which makes
14 sense, right?

15 A Yes.

16 Q So that is value. Now, I am just making
17 up numbers, and so if a cable operator said that the
18 Public Television signals had 10 percent of the value,
19 that would be \$20 million. If they said that Public
20 Television has 10 percent of the value, and they said
21 that commercial signals have 90 percent of the value
22 out of these signals we carried, that means that there

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1 is \$180 million of value if we take 200 as the total
2 value. Does that make sense?

3 A Yes, your right-hand side makes sense.

4 Q Okay. Now, if we -- we talked about the
5 amount paid in, and the amount paid in for Public
6 Television, and now I am running out of space, but you
7 can assume it is 4.8 for Public Television and 115.2
8 for the Commercials. So the relationships are not the
9 same in other words as the valuation.

10 The relative value of Public Television is
11 higher than the amount paid in.

12 A Well, again, you cannot attribute the
13 money that way. If you have in the typical case here
14 one commercial independent signal imported, that is
15 one DSE.

16 The Public is a .25 DSE. Under the
17 current system, this guy has to pay for 1 DSE no
18 matter what. The importation of the second signal
19 costs him .25, and the second signal could be
20 considered to be either C or P. He could drop either
21 one, and therefore the marginal cost to him of C is
22 .25 of a DSE, and the marginal cost to him of P is

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1 also .25 of a DSE.

2 Q Okay. I understand your point, but I just
3 want you to indulge me in the alternative hypothetical
4 for right now, which is that we know that they have
5 paid the aggregate, in the aggregate 96 percent of the
6 pool for commercial, and in the aggregate 4 percent of
7 the pool for public television.

8 But if we look at the valuation and you
9 look at 10 percent of the value, if you allocated the
10 royalty pool, you are going to have a situation where
11 the award to commercial is going to be 90 percent of
12 the pool, right, based on value, and so it is going to
13 be 108.

14 So for Public Television the number is
15 going to be 12, and that is very sensible under the
16 way that the compulsory license works isn't it?

17 A No, absolutely not. It is a total
18 misreading of how this system works, because --

19 Q In the relationship between value and the
20 amount paid in?

21 A Because we have just been through this.
22 How are you possibly going to assign revenues from the

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1 compulsory licenses or costs to C or P? There is a
2 possibility. Let's assume that every cable system
3 imported either two commercial stations, in which case
4 he has to pay for one more DSE. His first one is
5 free, right? He already has to pay for that.

6 Now, for the Public Television one, the
7 only way this could work is if everyone who imports
8 one Public Television station imports five of them,
9 and imports none of the commercial ones.

10 Then at the margin, it is costing him .25
11 for any one of those five, and it doesn't get mixed up
12 with the commercial. So if you could show me evidence
13 that all of the commercial signal importation by cable
14 systems are in groups of two, with no other public
15 systems, or that all of the public ones are in groups
16 of five, with no commercial ones, then your
17 hypothetical works.

18 Q Well, I am just asking you to accept an
19 assumption from me for purposes of the discussion so
20 that we can get to --

21 A But your assumption is at odds with how
22 the compulsory license schedule works. That's the

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1 problem.

2 Q Can I ask you a hypothetical question
3 here? You used a hypothetical question, and --

4 MR. COOPER: I would object. It is
5 argumentative.

6 JUDGE VON KANN: Let's hear the question.

7 BY MR. HESTER:

8 Q I am asking you to take the hypothetical,
9 and the hypothetical question is that we know, we know
10 that the percentage mix of how much was paid for
11 commercial, and how much was paid for Public
12 Television is accepted, and I recognize your point
13 that you don't know that in the real world.

14 But in that circumstance, you would agree
15 with me that there could readily be situations where
16 the relative value leads to a conclusion that if you
17 are making an award based on the relative value that
18 the amount paid in could be less than the amount
19 awarded based on the relative value?

20 A It is possible, but it is not possible
21 under the current compulsory copyright license
22 schedule, except under rather extreme circumstances,

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1 which I think you will agree don't exist, but it is
2 possible.

3 Q But if you take my assumption, that would
4 be a conclusion that would be realistic.

5 A And then we go back to that testimony, and
6 I guess you put in the record, or I can't remember who
7 did it, but which I gave in the '89 proceeding, where
8 we compared marginal and total value, and the only way
9 this could happen is if the demand elasticities were
10 quite different.

11 Q I think I am asking a simpler question
12 though, which is simply the relationship between value
13 and the compulsory license, and that the relative
14 value can be quite different from the relative amounts
15 paid in under a compulsory license?

16 A Yes. Now you said under a compulsory
17 license, and under some compulsory license systems,
18 other than the one that we are talking about here,
19 that is indeed possible.

20 Q I think either you are worn out or I am
21 worn out, or maybe we are both worn out. Let me ask
22 you to turn to page 9 of your testimony, please. At

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1 the bottom of the page, you say that distant signals
2 also provide a new source of live sports programming.

3 Do you see that?

4 A Yes.

5 Q And I take it that you would agree that
6 the evaluation of how much value a distant signal
7 brings to a cable operator has to take account of what
8 else they have on their system? In other words, what
9 other kinds of programming they have on their system?

10 A Yes, certainly.

11 Q And so you would certainly agree with me
12 that distant signals are not unique sources of
13 programming for live sports?

14 A They are in many cases unique sources of
15 specific kinds of sports, and it may be that those
16 kinds of sports are what attracts certain subscribers.

17 Q And most cable systems, in addition to a
18 distant signal with live sports, most cable systems
19 will have live network sports on them, right?

20 A Yes, they will have the local broadcast
21 stations, and plus they will have some cable networks
22 that have sports on them.

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1 Q And most of the live network programming
2 includes at least some measure of live sports?

3 A In this period, I am not as expert as
4 some. I don't recall how NBC was in the mix and so
5 forth, but yes, I think they probably all had some mix
6 of live sports.

7 Q And most of the cable systems during this
8 period also would have been carrying at least one
9 regional sports network?

10 A I suppose, but I have not looked at that
11 carefully.

12 Q And most of the cable systems would also
13 have been carrying ESPN?

14 A Virtually all of them do because of the
15 high value of sports, yes.

16 Q And most of them would have also been
17 carrying ESPN-2?

18 A At this time? You probably have a book
19 over there that shows that, but I don't know the
20 numbers. I am not sure.

21 Q Okay. So the way that you would approach
22 the valuation exercise in that context is to look at

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1 all of the other categories of live sports that are
2 already on that cable operator system, and assess
3 whether there is additional or incremental value
4 delivered by the sports on the distant signal. That
5 would be the method that you would apply?

6 A Well, the method -- well, any measure of
7 value is at the margin, and so when boards ask these
8 cable operators how much would they spend for a given
9 type of programming out of their budget, obviously it
10 is at the margin, given whatever else the cable system
11 has on its system.

12 Q At the bottom of 9, and over to 10, you
13 emphasize the point about the uniqueness of sports
14 programming, and I think you made this point earlier
15 in your testimony about games being unique. What is
16 it about unique or first-run programming that in your
17 view adds value for cable operators?

18 A Well, for all programming, what adds value
19 is an attraction of more subscribers. So I am not a
20 psychologist, and I don't know why subscribers
21 subscribe but being an American male, I know that a
22 lot of us take cable or DirectTV in order to get more

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1 choices of sports programs.

2 Q And you had said before lunch when I was
3 examining you, I believe, that certain old series that
4 are commonly available would not add as much value in
5 your view. What is the difference that you are
6 drawing between those two categories of programming?

7 A Well, I am not disparaging any one kind of
8 programming. What I am suggesting is that there is
9 nothing unique to yet another rerun of MASH or
10 whatever. That would will be able to see it again,
11 and again, and again, perhaps on different networks.

12 The value of a live sporting event, except
13 to a total fanatical who watches the replays over and
14 over again, largely is extinguished once the match is
15 over, and the result is decided and posted, and
16 everybody absorbs it.

17 And that I think is the difference, and
18 that is what makes having the Super Bowl so important.
19 You are not going to be able to go back and watch it
20 with the same degree of suspense on a replay 10 years
21 later.

22 Q The Super Bowl is pretty broadly available

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1 on network television though, right?

2 A It has generally been offered on network
3 television. I use that as an example. It could be
4 any event. It could be Sammy Sosa or Barry Bonds
5 hitting a home run on WGN, you know.

6 Q And I take it that the point that you just
7 made would apply to other kinds of first-run
8 programming, too?

9 A Oh, certainly. I think that live -- a
10 variety of live events of that sort, and there may
11 well be that there are some kinds of programming whose
12 value does not go down very rapidly with successive
13 replays. You know, you may want to watch Casablanca
14 over and over again.

15 But I am saying that in general sports has
16 this fairly unique characteristic of timeliness.

17 Q And the point might apply as well to other
18 categories of programming that are being shown for the
19 first time?

20 A Yes, it could be.

21 MR. HESTER: Okay. Dr. Crandall, that's
22 all I have. Thank you very much.

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1 THE WITNESS: Well, thank you.

2 JUDGE VON KANN: Okay.

3 BY MS. WITSCHER:

4 Q Good afternoon, Dr. Crandall. I am Carol
5 Witscher, representing the music claimants.

6 A How are you?

7 Q Very well, thanks, and you?

8 A Well, I am getting tired. Let's go at it
9 anyway.

10 Q For a very few minutes.

11 A Okay.

12 Q If I could direct your attention to Table
13 1 at page 4 of your testimony.

14 A Yes.

15 Q Now, this table omits the shares that were
16 received by Music claimants from 1990 to 1992,
17 correct?

18 A Yes. Well, it may include it if some of
19 it is out of payments from these payments, but it does
20 not break the Music claimants out separately, that's
21 correct.

22 Q Okay. If you would turn to Appendix A in

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1 your testimony at page 15. That does break out the
2 Music claimants' share?

3 A Yes.

4 Q And it shows that Music claimants received
5 4.5 percent of each of the basic, and 3.57 percent of
6 the funds in 1990, and 1991, and 1992?

7 A Yes, I believe that -- if I am not
8 mistaken, that was by a prearranged agreement was it
9 not? I don't know, but I think that is right.

10 Q Well, this is what it shows, right?

11 A That's right. That is what the final
12 award was, but how they got there is another matter.

13 Q Well, that is all I am asking you to agree
14 with; that is what got awarded?

15 A Yes, that is what is on there.

16 Q The board survey does not take any measure
17 of the value of music that is used in the program
18 categories that the board survey measures; is that
19 right?

20 A Ask me that question again? It does not
21 take into account?

22 Q It does not take any measure of the value

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1 of the music that is used in the different programming
2 types?

3 A No, it is implicit in the total value, and
4 that is just one of the inputs, I presume, to the
5 total value of the program suppliers, or any of the
6 others.

7 Q So the music is embedded in each of the
8 different values?

9 A Yes. Right. There is nothing in there
10 for Paul Newman either, yes.

11 Q And would you agree that the board survey
12 numbers will need to be adjusted for whatever award
13 the panel makes to music?

14 A They will need to be adjusted? Well, if
15 in fact the way the process works, and I am an
16 economist and not an administrative lawyer, is that
17 the panel awards a certain amount of money to the
18 music claimants, and by definition it comes out of
19 what they could award to someone else.

20 Whether they start with a total broken
21 down five ways, and then pull some of it out for music
22 claimants or not, I don't know how they proceed.

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1 Q But one of the criticisms that I think you
2 had of the prior CARP panel was that they didn't
3 explain themselves. They didn't explain why they were
4 reducing, for example, the amount that sports got?

5 And one good reason for reducing it would
6 be whatever shares would go to Music, right?

7 A It might be, yes, if they justify that,
8 and it showed the Music as valuable, yes.

9 Q And as an economist, you would like to see
10 or would have liked to have seen in the 1990 to 1992
11 CARP decision a better or more analytical explanation
12 as to why the panel deviated from the board's numbers?

13 A Yes, and my testimony suggested that I
14 find it hard to believe that they could find one,
15 particularly on the supply issue, or on the other
16 issue.

17 Q Did you -- strike that. If the judges
18 find that the Board's survey design and/or methodology
19 tends to over-value some types of programming, and
20 under-values other types of programming, wouldn't an
21 adjustment to the Board's numbers be appropriate?

22 A Absolutely, if they find that, certainly.

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1 MS. WITSCHER: Thank you. That's all the
2 questions that I have.

3 JUDGE VON KANN: Okay. Anything from the
4 Canadians?

5 MR. SATTERFIELD: We have no questions.

6 JUDGE VON KANN: Okay.

7 MR. COOPER: I would like to ask to take
8 a short break so that we could get organized.

9 JUDGE VON KANN: That sounds like it is a
10 good idea all around. Why don't we take until 5 after
11 3:00. How's that?

12 MR. COOPER: Okay.

13 (Whereupon, at 2:53 p.m., the hearing was
14 recessed and resumed at 3:10 p.m.)

15 JUDGE VON KANN: Okay. No redirect?

16 MR. COOPER: Well, I understand the Panel
17 may have --

18 JUDGE VON KANN: We may have some
19 questions, so why don't we take those. Judge Gulin?

20 JUDGE GULIN: All right. Dr. Crandall, I
21 just have a couple of loose ends hopefully that you'll
22 tie up for me. I thought I heard you say somewhere

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1 during your examination, during cross examination,
2 that you looked favorably upon the dissenter in the
3 last CARP Panel when that dissenter expressed the
4 notion that the supply side was really not that
5 important, because we were dealing with a forced sale
6 under the compulsory license. Do you remember that?

7 THE WITNESS: Yes.

8 JUDGE GULIN: Well, on the other hand,
9 when you first started to testify, I think what you
10 said is our charge should be to attempt to replicate
11 a market and determine how that free market would
12 handle royalty allocations among copyright owners in
13 the absence of a compulsory license.

14 So I guess my question, is there some
15 inconsistency here? If we're trying to replicate a
16 free market where there's no compulsory license, are
17 we then to think about that free market as if the
18 compulsory license had some influence?

19 THE WITNESS: I understand it. I guess
20 the question is whether you think of it as the -- with
21 the quantities fixed as we were discussing in the
22 questions that Mr. Hester raised, or whether you think

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1 of the market as allowing the proportions of
2 programming to change. That would be how the supply
3 affects would work.

4 Or, on the other hand, you could perhaps
5 attempt to determine how relative prices would be
6 determined, given the fixity of the programming on the
7 distant signal. I think it's almost an impossible
8 task. I don't know of any evidence that could be
9 produced that would allow you to do that.

10 So I guess what I'm saying is that even if
11 you could figure out how a free market would lead to
12 varying prices for the fixed quantity constraints
13 because of the compulsory license, it would be very
14 difficult to do.

15 JUDGE GULIN: All right. And along the
16 lines also about this free market standard, the way I
17 would look at a free market would be one where
18 copyright holders would be negotiating with the buyers
19 of their work for the future -- to negotiate a license
20 for the future use of their work. That's the way
21 negotiations are generally handled.

22 The parties get together and they say that

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1 you'll pay me X dollars, and you'll get to use my
2 copyrights for the next year, the next 10 years,
3 whatever. Of course, the Bortz survey doesn't do
4 that. What the Bortz survey is doing -- and I guess
5 there are some cases where technically -- let's say
6 there was a resolution of a legal dispute.

7 One could be looking retroactively to
8 price a right that has always accrued. Maybe there
9 was some dispute as to whether the right existed or
10 something like that. But generally, you're looking
11 prospectively when you're pricing -- when the free
12 market is looking at pricing copyright works.

13 Bortz looks prospectively by saying -- I'm
14 sorry, Bortz looks retrospectively by saying, "What
15 would you have paid?" If we're trying to replicate a
16 market, it would seem to me it would make more sense,
17 for example, for 1998, 1999, to ask to be looking at
18 -- take the survey before 1998 and say, "What would
19 you pay to the copyright purchasers, the cable
20 operators?"

21 Why I think this has some significance is
22 that we're going to hear testimony that 1998 was an

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1 exciting year for baseball. And there was a very
2 exciting home run contest going on involving the Cubs
3 on WGN, and a pennant race. Those things were not
4 known beforehand. It happens when you look back, you
5 can see value, but that's not something that would
6 have been taken into consideration by the parties when
7 they would have negotiated had there been a free
8 market.

9 Is that a defect in the Bortz study?

10 THE WITNESS: Well, I think it would be
11 difficult to do otherwise, frankly, because you
12 wouldn't know what he's about to carry. He's
13 responding during the year, and, as I understand the
14 way the compulsory license works, if he carries it any
15 time during the six months he pays for the whole six
16 months.

17 I mean, he could have been picking it up
18 during the period of --

19 JUDGE GULIN: Let me --

20 THE WITNESS: -- the Home Run Derby.

21 JUDGE GULIN: I agree with you it would be
22 very difficult to do. But I guess -- let me put the

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1 question this way. Is that type of testimony that
2 there was an exciting home run contest in 1998
3 something that we should even consider?

4 THE WITNESS: I think so, because as I
5 just mentioned the cable system could have made an
6 adjustment to carry it when it wasn't otherwise
7 carrying it. And so I suppose there's some
8 prospective aspect there.

9 I agree with you that most contracts are
10 negotiated for a prospective period. There are some
11 contracts where there's a true-up for retrospective
12 results in broadcasting in particular, but it would be
13 better. But, again, it's hard to specify the
14 questions in advance of the economic activity in the
15 survey.

16 JUDGE GULIN: Thank you. That's all I
17 have.

18 JUDGE YOUNG: Picking up on something Mr.
19 Hester said at the end, we talk, as you've talked in
20 your testimony, or you're in testimony, about general
21 characterization of sports fans as intensely loyal, as
22 liking live events. Isn't it more precise in this

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1 analysis to say any cable operators -- it also goes
2 beyond that and sort of analyzes what's missing from
3 already in the system, and then decides whether its
4 sports fans are going to be interested and what they
5 might bring in through distant signal?

6 THE WITNESS: Well, I think we can agree
7 that they are always interested in what any program
8 decision would do to attract incremental subscribers.

9 JUDGE YOUNG: Right.

10 THE WITNESS: It doesn't have to be the
11 intense loyalty of sports fans. It might be just a
12 different mix of programs of some sort, and it may not
13 be just because of loyalty. It may be because the
14 DirecTV package, for instance, assumes that -- I
15 presume is valuable to some because you get to choose
16 among a whole host of games at any one period of time.
17 So the economics of it are what will attract more
18 subscribers to my system.

19 JUDGE YOUNG: So if I'm in New York, as I
20 am, and I can get on both network as well as local
21 television my hometown sports team, and the cable
22 operator knows that, they've got to make a judgment

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1 that there's something else out there that would be
2 attractive from a sports perspective, and that the
3 typical New York fan would want to see, for example,
4 the Cubs. Is that correct?

5 THE WITNESS: Well, but the typical -- I
6 mean, this is a country where 20 percent of people
7 move every year. There are a lot of people living in
8 New York who didn't grow up with an affinity to the
9 Mets or Yankees. There may be a lot of Cubs fans
10 there who moved from Chicago.

11 So, I mean, I -- we're getting beyond my
12 expertise here, but it strikes me that it's possible
13 that there could be a substantial number who would
14 want WGN for that reason.

15 JUDGE YOUNG: The reason I'm asking you is
16 that in your testimony there's this general
17 description of why this all makes sense in light of
18 what we know about sports fans. And I guess I'm just
19 trying to get sort of a nuanced understanding of that,
20 that, in fact, one could agree that sports fans may or
21 may not like something, but on the other hand it
22 doesn't mean that they're going to subscribe to a

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1 cable system, if they tend to bring on a particular
2 program or not.

3 THE WITNESS: No, it doesn't necessarily
4 mean that. That's certainly true. The fact that the
5 Bortz survey uncovers time and again that the cable
6 system views the sports programming as so important on
7 these distant signals I think suggests that it must
8 appeal to someone, and you must be getting some value
9 out of it.

10 JUDGE YOUNG: Now, when you were -- had
11 your interchange, the colloquy with Mr. Stewart, I
12 want to just make sure I understood your perspective
13 on some of the issues he raised. And we had talked
14 about the retransmission.

15 THE WITNESS: Yes.

16 JUDGE YOUNG: And at least I think I
17 understood your point to be that the fact that there's
18 -- the broadcasters are not obtaining or trying to
19 obtain significant revenues for retransmission rights
20 is at least evidence as to the value of the locally
21 produced programming that are the subject of their
22 claim, the NAB claim?

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1 THE WITNESS: Well, again, if it goes back
2 to the supply issue, it's not a measure -- it doesn't
3 reflect the value to the cable system of that
4 programming, but, rather if you're going to take into
5 account how the prices might settle out in equilibrium
6 for -- again, getting back to Mr. Gulin's point -- for
7 the fixed allocation of programming on those distant
8 signal imports, then the fact that the broadcaster
9 would be unwilling to negotiate is hard -- and
10 withhold this station in a cable system, because in so
11 doing he reduces his audience, and, therefore, his
12 advertising revenue, it seems to me goes to the supply
13 issue -- an incentive that, for instance, the sports
14 leagues do not have.

15 JUDGE YOUNG: So if they were willing to
16 play hard ball, it might reflect a greater valuation
17 of their own programming or a different mix about a
18 value that they're producing.

19 THE WITNESS: It would reflect a
20 willingness to go after the revenue stream -- I won't
21 call it copyright royalties, but the revenue stream,
22 and risk the withholding of the signal and the loss,

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1 therefore, of the advertising stream. It doesn't have
2 any effect on the value of it to the cable system or
3 the ultimate subscriber.

4 JUDGE YOUNG: And the last question I have
5 is the issue came up earlier when Mr. Stewart was
6 citing to your own article with respect to the
7 leverage that the football leagues have given that
8 they have no real professional level of competition in
9 this country. Do you remember that?

10 THE WITNESS: I remember that discussion.

11 JUDGE YOUNG: Okay.

12 THE WITNESS: I'll respond after you
13 finish asking --

14 JUDGE YOUNG: Well, I wasn't sure I got --
15 understood whether you were making a point with
16 respect to that or you were being asked to make a
17 point, and I guess I want to at least understand your
18 -- any conclusions you might draw from that fact.

19 THE WITNESS: Well, in the first place, if
20 I may for just a moment, the thrust of that article
21 was to look at how sports broadcasting affects
22 consumer welfare through the dissemination of loss of

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1 games as well as competition in the distribution
2 media.

3 And what we came -- what we found was --
4 maybe it wouldn't be surprising to you, but it was
5 quite surprising to me, was that in Europe the
6 dominance of the Premier Football League, the Premier
7 League in the U.K., Serie A in Italy, means that there
8 is very little competition for the sports dollars in
9 the United States, even though there may only be one
10 football league, one baseball league, one basketball
11 league, one hockey -- professional hockey league.

12 I mean, there are some smaller ones -- a
13 continental basketball league, and so forth. It
14 doesn't mean there's no competition. There is much
15 more competition from what ESPN does between the
16 leagues.

17 However, were there more leagues, clearly
18 there would be more people negotiating to try to get
19 carriage on the cable systems, and the rents would
20 shift from the leagues to the cable systems, who are
21 not without market power of their own.

22 JUDGE YOUNG: Okay. So to the extent,

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1 though, that -- taking into account all of your sort
2 of other variables, but to the extent that at least
3 one variable in this mix is that they do have that --
4 that power, the pro -- all leagues have that power, I
5 mean, do you view that as sort of an artificial
6 inflator as to the value, or is that something that we
7 should just take as an indication of value?

8 THE WITNESS: The fact that they have some
9 -- that there's not a perfectly competitive market for
10 professional football or professional basketball to me
11 is no different as far as your considerations than the
12 fact that Paul Newman is not a perfect substitute for
13 Tom Cruise. These people earn substantial rents
14 themselves. So it really doesn't matter that much.
15 You can't -- not anybody can do what Tom Cruise does,
16 and not anybody can offer the NFL or offer
17 professional football.

18 So there are rents -- the nature of
19 broadcasting in cable and the media is that there are
20 huge rents earned by everybody. They are all getting
21 more than they would get in their next best
22 alternative.

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1 JUDGE YOUNG: And the last question I had
2 is following up on a colloquy, again, that you had
3 with Mr. Hester regarding what's on the chart there.

4 THE WITNESS: Yes.

5 JUDGE YOUNG: The value which is paid. Do
6 you accept the proposition that a programmer like PBS
7 or public TV can have value in excess of what they're
8 getting paid through the -- you know, through the
9 royalties attributed to their programming?

10 THE WITNESS: Well, if you could, if, in
11 fact, there were -- it were possible to isolate just
12 the royalties paid for PBS, then the question is: is
13 it possible that they should get even more?

14 JUDGE YOUNG: No, I understand you -- a
15 lot of that discussion was that it's not possible
16 necessarily to isolate the royalties paid for PBS.

17 THE WITNESS: Right. Right. But assuming
18 it were --

19 JUDGE YOUNG: Right.

20 THE WITNESS: -- is it possible that, you
21 know, if you had explicit pools that seemed to go to
22 sports, to PBS, and so forth, is it possible you could

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1 allocate more. And there it strikes me the only way
2 you could make such a decision is if, by making these
3 payments, there is a contingency value to the cable
4 system. That is, it keeps these guys alive a little
5 bit longer, so that they are there for -- they have an
6 option to take it at some future time period.

7 But I can't see how that theory holds
8 together. It doesn't seem to me that these copyright
9 payments are necessary in order to keep that option
10 alive.

11 JUDGE YOUNG: Well, as I understand part
12 of the discussion is that Congress, through this
13 formula, has said public television is worth X amount,
14 and X amount may be less than commercial TV in terms
15 of just the royalty calculations and the royalty
16 formulas.

17 THE WITNESS: If there's something in the
18 statute that says that, I'm not aware of that.

19 JUDGE YOUNG: Well, I may not be --

20 (Witness laughs.)

21 -- but I thought that was part of the --

22 THE WITNESS: Yes.

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1 JUDGE YOUNG: But that one could then
2 argue that, you know, having non-commercial TV in this
3 country has a certain value which might exceed that.
4 And to some extent, we should -- we should understand
5 that and maybe reflect on it.

6 THE WITNESS: If that's your instruction
7 from Congress, then that's possibly true. I mean, you
8 can make arguments or the public goods sorts of
9 arguments for a variety of services. I'm not sure
10 I've seen that made in the context of these cases,
11 though.

12 JUDGE YOUNG: Okay. Thank you.

13 JUDGE VON KANN: Judge Gulin a follow up.

14 JUDGE GULIN: I apologize to you, Dr.
15 Crandall, but I'm going to follow up --

16 THE WITNESS: Sure.

17 JUDGE GULIN: -- two questions from my
18 colleague. Getting back to PBS, if it were possible
19 to determine what the royalties were attributable to
20 PBS, I'm still not quite understanding why that amount
21 really has much meaning if it's not a free market
22 amount. If it's an arbitrary amount imposed by

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1 Congress, what does that have to do with allocations
2 under a free market standard? Why would we be limited
3 to that amount?

4 In other words, under your theory I think
5 what you're saying -- whatever that is, if it's X,
6 that necessarily follows, then, that the amount that
7 we would have to give as a value to public television
8 is also exactly X. And it's not clear to me why
9 that's the case if we're talking about two different
10 standards.

11 THE WITNESS: Well, the only reason, I
12 mean, to an economist that this is interesting, it
13 seems to me, is that they are buying a mixture of
14 programming on signals, and it's hard to determine how
15 much is due to X.

16 If you can determine that -- that is, if
17 the copyright system were structured in such a way,
18 the compulsory copyright system, you could determine
19 precisely how much was paid in, that reflects the
20 market decision.

21 Now, if you're going to tell me that, in
22 fact, the Congress set the rates wrong and is

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1 instructing you to set them right --

2 JUDGE GULIN: Okay. For the sake of our
3 discussion, let's assume that whatever that rate is
4 it's not a fair market rate. It's a rate that
5 Congress set arbitrarily. Okay? It's not a fair
6 market rate.

7 That being the case, is there really any
8 correlation necessary between the money coming into
9 the pool, which is based upon whatever Congress says
10 it should be -- and you know what it is, it's based
11 upon these DSE values. It doesn't have anything to do
12 with the value of public television. It's simply an
13 arbitrary amount that's been imposed by Congress.

14 That has nothing to do with dividing up a
15 pool based upon fair market value, does it?

16 THE WITNESS: Well, the size of the pool
17 doesn't, no. I mean, the question is how you divide
18 it up relatively, and the fact that in fact -- the
19 fact that these imported distant signals may create,
20 say, \$500 million worth of value and only cost the
21 broadcast -- the cable systems \$100 million, simply
22 means that they are getting a substantial amount of

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1 surplus.

2 But it doesn't say that you throw out the
3 estimates of relative value therein, unless there is
4 some -- unless the Congress did something, which would
5 be rather bizarre -- that is, set the relative rates
6 for different types of signals incorrectly, and then
7 instructed you to find out what the correct one is.

8 But in this particular case, because the
9 rates are set in the step function that they are, and
10 because you import mixtures of programming
11 particularly on the independent signals, it's very
12 difficult for an economist to make those attributions.

13 JUDGE GULIN: Okay. All right. I also
14 wanted to follow up my colleague's question about
15 retransmission consent, because I'm still a little bit
16 fuzzy as to what your point is there.

17 If it is a fact, as you believe, that very
18 little money changed hands as a result of
19 retransmission consent, I think all I got from you is
20 that all that means is that that revenue stream is not
21 very important to the broadcasters. I'm trying to put
22 that in context of how -- the relevancy of that with

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1 respect to this proceeding.

2 I think I asked, and I think my colleague
3 also asked, are you trying to say that -- that the NAB
4 value is somehow diminished as a result of that? And
5 I don't think you said yes either time. All you
6 continue to say is that all it shows is that the
7 revenue stream -- that revenue stream is not important
8 to the broadcasters.

9 But what's important to the broadcasters
10 is expanded reach and more viewership. So I'm still
11 not getting the point exactly as to what it says about
12 the supply side.

13 THE WITNESS: Well, I'm sorry for the
14 imprecision in my answer. But I -- what I was
15 attempting to say was that the value of these signals
16 are determined relatively by the Bortz survey, but
17 that to the extent the Bortz survey does not take into
18 account the supply conditions it may be that in the
19 head-to-head bargaining between the buyer and the
20 seller that the seller would be -- would find himself
21 willing to offer that programming for close to nothing
22 or at very low prices, because he does not want to

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1 risk not having it carried because his revenue -- he
2 would put at risk his revenues from advertising.

3 And, therefore, it only goes to the supply
4 conditions, not to the value --

5 JUDGE GULIN: All right. Okay. So then,
6 what you're saying is that the hypothetical market
7 that we should be looking at is one where it's the
8 distant signal that is the buyer, and not the
9 individual copyright owners. If that's -- if
10 retransmission consent and lack of payment, therefore,
11 shows the supply side, showing the supply side of what
12 transaction? So in showing the supply side of a
13 transaction between the distant signal and the cable
14 operators, correct?

15 THE WITNESS: Well, it would be for the --
16 to the extent -- for the -- the only copyright he owns
17 is for his own programming.

18 JUDGE GULIN: Right.

19 THE WITNESS: Right. So we're talking --
20 to the extent that he has the right over that, then he
21 would be unwilling to deny that -- that -- but by
22 derivative he -- any decision he makes about allowing

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1 carriage has an affect upon his upstream supplier of
2 sports, syndicated programs, movies, etcetera.

3 JUDGE GULIN: Directly -- the most direct
4 significance is it shows the supply side of NAB,
5 because that's the programming that's owned by the
6 station.

7 THE WITNESS: That's how I look at it.

8 JUDGE GULIN: Gotcha.

9 THE WITNESS: Yes.

10 JUDGE VON KANN: Dr. Crandall, just -- I
11 have just a few questions. Hopefully, it won't delay
12 your getting out of here too much.

13 Looking at page 9 of your testimony, and
14 a paragraph that you were directed to earlier,
15 paragraph 19, which talks about the Bortz data, shows
16 that cable operators place a very high value on sports
17 programming. And this whole question of valuation I
18 find is a little bit like beauty, somewhat in the eye
19 of the beholder I guess, and I'm trying to understand
20 how we go at it.

21 You say this result is not surprising, and
22 then you give some reasons. You say the programming

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1 of the JSC is unique in that it is live, first-run
2 programming.

3 Now, I guess I want to ask if it -- if
4 that is -- if the JSC programming is really, in that
5 sense, unique. Yes, there is a lot of live, first-run
6 programming. But it seems to me there's a fair bit of
7 live, first-run programming in some of the other
8 claimants.

9 I mean, the State of the Union address I
10 guess is a live, first-run event, you might say. The
11 Academy Awards I guess is a live, first-run event. The
12 final episode of The Sopranos, which everyone was
13 dying to see at one point, wasn't -- I guess it was
14 not live. It had been taped. But that was the moment
15 that you turned on to see whatever it was that people
16 were talking about.

17 I mean, it doesn't strike me that JSC is
18 the only guys in town who have sort of live, first-run
19 events that people want to see right at that moment.
20 Would you --

21 THE WITNESS: No, I think that's true. I
22 mean, there are obviously other events, but I think

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1 they are a much smaller share of the programming
2 offered in other areas.

3 For instance, you might say that news --
4 something those of us who followed day by day what was
5 going on in Iraq --

6 JUDGE VON KANN: Right.

7 THE WITNESS: -- would be an example. But
8 having just returned from Europe and watched CNN
9 International on numerous hotel televisions, I assure
10 you that most of what CNN carries is just a repeat of
11 the same stuff over and over and over again, stories
12 which they can continue to repeat for several days.

13 Sports is rather different. Once someone
14 knows the outcome, he's not as interested in hearing
15 about it again and again and again. I think most
16 people aren't. But ultimately the question is: why
17 is it that cable systems, in their actual behavior, in
18 the purchase of ESPN and other sports-related
19 networks, and in their assessment of the value of
20 these distant signals, put such a high value on
21 sports?

22 And I think that's probably the reason,

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1 but my -- my observations as an economist are the
2 value of this programming, because it apparently
3 attracts additional subscribers.

4 My explanation as to why this is is more
5 in the area of, I don't know, psychology or sociology.
6 But it's an attempt to try to explain why this is.

7 JUDGE VON KANN: So I think what you're
8 saying is that perhaps -- let's see if I get this --
9 the JSC is unique in that virtually all of their
10 programming is of this character, whereas other
11 claimants have some first-run live programming, but
12 it's a smaller part of their total package I guess.

13 THE WITNESS: Right.

14 JUDGE VON KANN: You have not, I take it,
15 undertaken a study, though, as to what portion of,
16 let's say, the news -- you know, the broadcaster's
17 programming is live, first-run programming.

18 THE WITNESS: No, I have not.

19 JUDGE VON KANN: Okay. You've also
20 referred in this paragraph that another factor is the
21 sports fans being intensely loyal. We've had some
22 discussion about that, but I'm told that so are Star

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1 Trek fans and, unfortunately, some fans of Jerry
2 Springer, and other -- there's loyalties and there's
3 loyalties out there, I guess.

4 And you're not aware -- I'm not aware --
5 and I wonder if you are -- of any studies of the
6 comparative loyalty of fans of sports versus fans of
7 some of these other claimants.

8 THE WITNESS: No. But assume you're an
9 intense fan of Tolkien novels and Tolkien movies. You
10 can watch them at the Uptown Theater up here. You
11 could wait for the DVD, or you could get it on cable,
12 or you could get it on subsequent network broadcast.

13 You could still satisfy your hungering for
14 that, albeit with some time delay. Once the result is
15 in on the Super Bowl, particularly if yours was the
16 losing team, you're not interested in going back and
17 rewatching that. So I think there is a difference
18 here.

19 JUDGE VON KANN: But I take it you would
20 agree that some of the other claimants probably have
21 some intensely loyal fans within their ranks as well.

22 THE WITNESS: Certainly.

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1 JUDGE VON KANN: And you don't know a
2 comparative study of the volume of those fans or the
3 number of intensely loyal -- the hours that intensely
4 loyal fans of PBS may be glued to their sets, I take
5 it.

6 THE WITNESS: No, I don't, nor do I know
7 how that translates in their willingness to subscribe
8 to cable television, which is the important question
9 here.

10 JUDGE VON KANN: And I guess the sort of
11 final question about that is that notwithstanding
12 these characteristics, these JSC characteristics, of
13 having predominantly live, first-run programming and
14 lots of loyal fans, the sports group came in second
15 here in terms of the claimants that we deal with. The
16 program suppliers beat them in the Bortz survey,
17 correct?

18 THE WITNESS: That's right. I mean, in
19 toto they --

20 JUDGE VON KANN: In toto, when you put the
21 two components of --

22 THE WITNESS: Right, right. Yes, yes,

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1 yes.

2 JUDGE VON KANN: -- it together. So
3 whatever the value of the live, first-run programming,
4 and the loyal sports fans, it was not enough to
5 displace the program suppliers as having a larger
6 valuation in the Bortz survey.

7 THE WITNESS: I think that that reflects
8 sort of my wife's solace, which is there is much more
9 of this other stuff than sports in terms of minutes,
10 right? I mean, there's a huge amount of syndicated
11 programming and motion pictures out there relative to
12 the number of live sporting events in each one of
13 these leagues here.

14 JUDGE VON KANN: So that suggests that it
15 is appropriate for the Panel to consider the volume of
16 programming that these different claimants are
17 providing?

18 THE WITNESS: No, not at all. I think all
19 you -- the Bortz survey is sufficient. But I think
20 your reflection on the fact that the program suppliers
21 get a larger share is indeed a reflection of the fact
22 that this is a huge mass of this. The value of any

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1 one piece of it, particularly certain important
2 sporting events, is very high relative to the average
3 value of a syndicated program or a movie.

4 But there's so -- there's such a huge mass
5 of syndicated programming and movies that overall the
6 values come out somewhat higher for the program
7 suppliers than for the sports.

8 JUDGE VON KANN: Okay. Mr. Cooper?

9 MR. COOPER: Nothing further.

10 JUDGE VON KANN: All right. Well, thank
11 you very much. You are excused. Thank you.

12 (Whereupon, the witness was excused.)

13 JUDGE VON KANN: Okay. Fine.

14 MR. COOPER: Our next witness will be Dr.
15 Hazlett.

16 JUDGE VON KANN: Okay.

17 WHEREUPON,

18 THOMAS W. HAZLETT

19 was called as a witness by Counsel for the Joint
20 Sports Claimants and, having been first duly sworn,
21 assumed the witness stand, was examined and testified
22 as follows:

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DIRECT EXAMINATION

BY MR. COOPER:

Q Good afternoon, Dr. Hazlett.

A Good afternoon.

Q Can you just give your name and your current position, please?

A My name is Thomas W. Hazlett, and I'm a Senior Fellow at the Manhattan Institute for Policy Research. And I have other affiliations; would you like me to list those or --

Q If you could just briefly summarize your other affiliations, that would be fine.

A I'm a Senior Research Associate at the Columbia Institute for Tele-Information. Also, a Senior Advisor to the Analysis Group, and economic consulting firm.

Q And before you were with the Manhattan Institute, can you tell me where you were?

A Well, I taught economics and finance at the University of California at Davis, essentially from 1984 through -- I was on the faculty through 2000. I left there in 1998 and was a Resident Scholar

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1 at the American Enterprise Institute. I've been at
2 the Manhattan Institute since 2001. I also served as
3 Chief Economist of the Federal Communications
4 Commission, 1991/'92.

5 Q With respect to that, the last position
6 that you mentioned, Chief Economist at the FCC, can
7 you just explain what the responsibility -- what the
8 -- just sort of generally explain the responsibilities
9 in that position?

10 A The Chief Economist slot at the FCC is a
11 -- essentially a visiting slot where academics come in
12 on a temporary basis, so to speak, and serve as
13 advisors to the Commission, primarily the chairman of
14 the Commission on a range of areas, whatever might be
15 the policy issues of the day related to regulation and
16 communications and the responsibilities of the FCC,
17 which extend, of course, over wire-line
18 communications, telephone and cable, and also
19 spectrum-based services, wireless telephone and
20 satellite, and so forth.

21 Q And have you, in connection with this
22 proceeding, have you submitted written testimony?

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1 A Yes, I have.

2 Q In connection with that testimony, did you
3 work with staff at Analysis Group?

4 A Yes, I did.

5 MR. COOPER: Okay. And that's I believe
6 at Tab F of the JSC case.

7 Any voir dire?

8 JUDGE VON KANN: Anybody? Okay.

9 BY MR. COOPER:

10 Q Dr. Hazlett, could you briefly summarize
11 your testimony?

12 A I was asked essentially to do two things.
13 First, to explain this noticeable drop in the cable
14 royalty funds between 1992 and 1998 essentially, and
15 to sort of decompose that decline. And I observed
16 that there were obviously various things going on in
17 the market at this time, including continued
18 subscriber growth, important legislative changes that
19 led to a reduction in the fund, and superstation
20 carriage changes that also led to important changes in
21 the size of the funds.

22 And then I was asked to comment on the

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1 implications to allocation of the shares in the
2 royalty proceedings.

3 Q If we can look at on page -- well, do you
4 have your report in front of you?

5 A I do.

6 Q Okay. If you could look at page 4,
7 Figure 1. Can you explain what this figure shows?

8 A We're looking here in Figure 1 at the
9 total royalty funds, and so this includes all of the
10 funds, including the Basic and the 3.75 Fund. And it
11 goes from 1990 through 1999 here. The important
12 points go from 1992 to 1998 essentially when the total
13 size of the -- I'll just call it "the fund" -- goes
14 from about \$188 million to about \$108 million.

15 Q It may be, judging by some of the prior
16 questions here, that the Panel understands this. But
17 can you just very briefly explain how the compulsory
18 -- how any system calculates its compulsory license
19 fee?

20 JUDGE VON KANN: If at some point we feel
21 it's offensive that you are --

22 (Laughter.)

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1 -- we'll let you know. But up to now, you
2 can go ahead and indulge us and explain it, if you
3 wish.

4 THE WITNESS: Yes. Each cable system has
5 the ability under a compulsory license to bring in
6 distant signals and pay compensation for the copyright
7 owners into the cable royalty fund.

8 And the fund is determined essentially by
9 three things -- the number of subscribers of that
10 basic system, the number of -- the rate for the basic
11 tier service. That's the lowest price, minimum basic
12 service that by law has the broadcast signals on it.
13 And the number of distant signals, the so-called DSEs
14 or distant signal equivalents on the cable system. And
15 there's a rate structure built around those DSEs.

16 BY MR. COOPER:

17 Q If you look at, on page 11 of your report,
18 Figure 2, this deals with -- it's titled "Subscriber
19 Growth," which was one of the components I think you
20 mentioned. Can you explain what this shows?

21 A This is actual subscriber growth for so-
22 called Form 3 cable systems. I didn't -- I separated

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1 out Form 1 and 2 systems that account for less than
2 five percent of the total fund, and those royalties
3 are calculated in different ways.

4 But for the vast majority of the funds
5 coming from Form 3, payments are based upon
6 subscribers paying in -- paying a basic rate, and
7 these subscribers -- the base so to speak, the
8 subscriber base, grows from about 47 million the last
9 half of 1992 to about 58-1/2 million in the last half
10 of 1998. So that's about a 24 percent growth, so
11 that's actual, not projected.

12 Q So why, for purposes of your assignment
13 here, did you investigate what was going on in the
14 number of subscribers?

15 A Well, because the -- all else equal, as
16 the subscribers increase the payments into the funds
17 increase, and the fund grows.

18 Q If you look down at page -- on the next
19 page, page 12, Figure 3, could you just sort of walk
20 us through what this graphic shows?

21 A Yes. The starting point on Figure 3 would
22 be 1992, and there you have total royalty funds of

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1 about \$188 million, as we noted a moment ago. If you
2 just extend that baseline out to 1998 with subscriber
3 growth, you have that about 23, 24 percent growth.
4 Because I subtracted out the Form 1 and Form 2
5 systems, there's actually a little less growth here in
6 this benchmark.

7 I subtracted out the Form 1 and Form 2
8 revenues from the base in '92, and then just added
9 back actual Form 1 and Form 2 system fund royalties in
10 1998.

11 Anyway, there's about a 23, 24 percent
12 increase in this baseline. And so that takes us out
13 to the point you see there in 1998 on what's called
14 baseline.

15 Q Let me just stop you there. Is that -- is
16 the baseline -- are you accounting for subscriber
17 growth but holding everything else equal?

18 A Yes.

19 Q Okay.

20 A And that's about \$232 million. So that's
21 just a projection of where we would have been if
22 nothing changed from '92 to '98, except the subscriber

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1 growth that was actually seen for the Form 3 systems.

2 Q Okay. Now, can you explain what the
3 actual line is below that?

4 A The actual, as indicated by the term, are
5 the revenues, the actual revenues that came in,
6 starting at \$188 million or thereabouts in 1992, and
7 ending up at about \$108 million in 1998.

8 Q I think you identified in your summary two
9 different categories of effects that you had
10 discovered. Are those represented in any way on this
11 chart?

12 A They're not broken out specifically here.
13 But the shortfall -- there's some indication on this
14 chart, because we have some indication on the time
15 axis, the horizontal axis, the legislative changes
16 primarily came in the '93/'94 period, and then the
17 super -- the major superstation changes were, of
18 course, the elimination of satellite distribution of
19 WWOR from '96 to '97, and then the elimination of WTBS
20 as a superstation in 1998.

21 And so those effects are shown. They're
22 not actually quantified. The shortfall that's noted

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1 on the 1998 line indicates the difference between this
2 baseline where we're just increasing the '92 fund for
3 subscriber growth and actual. And so that amounts to
4 about 78 -- I think about \$78 million.

5 Q Is that shortfall what --

6 A I'm sorry. 232 minus 108, that's more
7 than that. That's 232 minus 108, about 124, about
8 \$124 million.

9 Q Is that shortfall, then, what you're
10 examining in the -- when you talk about these
11 legislative and superstation changes?

12 A Yes.

13 Q Why don't we focus, then, first on the
14 legislative changes identified in your report. I
15 think you've identified two, the '92 Cable Act and the
16 1994 Satellite Home Viewer Act. If I could direct
17 your attention first to the 1992 Cable Act. Can you
18 just summarize or -- the effects or the changes
19 introduced by the 1992 Cable Act?

20 A Yes. The '92 Cable Act had three
21 interesting pieces of reform, so to speak, in this --
22 of relevance to this proceeding. The first thing it

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1 did, and probably the most important part of the Act,
2 was it instituted rate regulation on cable television.
3 And at the same time, as part of that rate regulation,
4 actually mandated that a basic tier be offered
5 separate from anything else, and the basic tier
6 include all of the off-the-air television stations.

7 So that turned out to be very important in
8 so-called retiering in the industry and repricing,
9 particularly of the lowest price basic tier that did
10 fall substantially in price.

11 Then, in addition to that, you had what
12 was called must carry and retransmission consent. Must
13 carry and retransmission consent, two policies that
14 are sort of talked about in tandem. The reforms in
15 the '92 Act gave each TV station the opportunity to
16 elect to claim must carry status in its local market,
17 i.e. get carriage at a price of zero but get carriage
18 on all of the local cable systems, or forego the must
19 carry right and elect retransmission consent -- the
20 opportunity to bargain for a price, with the
21 possibility that no agreement will be reached and the
22 station might not get carriage on local cable systems.

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1 So these were the major changes that took
2 place in the '92 Act.

3 Q Okay. If I could focus you first on rate
4 regulation, and, in particular, if you could look at
5 page 15, Figure 4. Can you explain what this figure
6 shows?

7 A Yes. The cable royalties are, of course,
8 set on -- for Form 3 systems are set on percentages of
9 gross receipts, and gross receipts are determined by
10 the number of subscribers paying the basic tier rate.
11 So the basic tier rate is very important. That's the
12 receipt fund that the royalties are calculated as a
13 percentage of.

14 And here we see that in 1992, second half,
15 the basic rate for this basic programming tier is
16 \$16.17. That falls, and you see that by 1997, second
17 half, you're at \$13.02 for that basic tier; slightly
18 higher than that in 1998, second half, \$13.15.

19 Q And I think we'll come back to this when
20 we look at sort of the summary effect. But have you,
21 in fact, calculated how this affects -- this decrease
22 in the receipts per subscriber, how that affects the

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1 fund?

2 A Yes. It just -- it lowers it by the --
3 commensurate with the percentage drop, it lowers the
4 -- it lowers the payments into the fund by that
5 amount, and that's about almost a 19 percent drop
6 between '92 and '97.

7 Q Just to make sure that the point is clear
8 here, can you explain the relationship between rate
9 regulation in the 1992 Cable Act and fall in the gross
10 receipts per subscriber?

11 A Yes. Well, rate regulation essentially
12 created or mandated a two-tier system for the cable --
13 for cable systems, that they offer a tier without
14 their expanded programming, so-called cable
15 programming tiers, but offer a basic tier of services.

16 With the -- and that's what you're looking
17 at here, that the price of this tier is not what
18 people would typically think of as subscribing to
19 basic cable, which has a lot more cable programming
20 services on it. This is essentially a creature of the
21 rate regulation system, where a low price is offered
22 for a service tier that essentially is a stepping

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1 stone to other cable programming tiers and premium pay
2 per view other services on top of that.

3 Q So this represents the most basic level of
4 service that you could get on a cable system?

5 A Correct.

6 Q You mentioned as a second effect of the
7 '92 Cable Act must carry. Can you explain any
8 implications that must carry would have for the fund
9 that is at issue here?

10 A Yes. Well, must carry pulled all local
11 channels onto cable system essentially at the
12 election, of course, of the broadcast station. It was
13 possible for the broadcast station to say, "No, I
14 don't want must carry and then to be left off after
15 not reaching a retransmission consent."

16 But the -- obviously, the intent of must
17 carry was to give carriage to local stations that have
18 been having trouble getting carriage on local cable
19 systems, and it did, in fact, achieve that. And so
20 what that does in terms of distant signals is it tends
21 to crowd out distant signals.

22 It tends to put some marginal local

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1 stations, broadcast stations, on cable systems, and,
2 therefore, use up slots or capacity that could be used
3 for other programming, including distant broadcast
4 signals.

5 Q Now, if we look at page 17, Figure 5, does
6 that relate to this issue of must carry in the
7 crowding?

8 A Yes, it does. Interestingly enough, the
9 number of broadcast stations carried by Form 3 cable
10 systems stays constant between '92(2) and '98(2), but
11 the composition of those broadcast signals changes.
12 Distant signals are about 3.3 out of 10 point -- what
13 was it? I can't exactly read what the scale is.

14 Q 10.8. If you look at page --

15 A Is it 10.8? Okay. 3.3 out of 10.8 to get
16 -- yes, sorry. It is clear on here?

17 So, in 1992(2), you've got 3.3 distant
18 signals out of a total of 10.8 broadcast signals being
19 carried. That collapses down to 1.8 on average, with
20 local coverage going up from 7.5 to 9.0.

21 Q When a local broadcast signal would elect
22 must carry, why would that mean that -- why would the

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1 cable system necessarily have to drop a distant
2 signal? Why wouldn't they just add the local signal
3 and keep everybody else?

4 A It's possible that they could, but it's
5 also possible that they would not want to do that.
6 There is both a crowding out or a capacity issue, and
7 there's a substitution issue that if you have a
8 broadcast signal you were carrying from a market next
9 to you, and then you had to carry another additional
10 signal in your own market, then you might consider it
11 now not a good idea to use up an extra channel for
12 that distant signal, something of that nature.

13 Q Turning to the third thing you mentioned,
14 I think in tandem with must carry, which was
15 retransmission consent, how did that -- did that
16 affect the fund? Is it relevant to the fund?

17 A Well, it affects it indirectly in the
18 sense that retransmission consent did give broadcast
19 stations some additional -- well, the right to
20 bargain, so that -- you know, they won that in
21 retransmission consent. They didn't have the right to
22 bargain for carriage before.

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1 And as these retransmission consent
2 negotiations went, particularly in local markets,
3 where you had some network signals and strong
4 independence bargaining with local cable systems, the
5 general result of the bargaining was that -- not that
6 the broadcasters got paid substantial sums for their
7 signals, but that they often won carriage agreements
8 for cable programming that they owned.

9 So a lot of the broadcasters -- in fact,
10 most cable networks are owned by broad -- most of the
11 equity in the cable networks is broadcaster-owned. The
12 broadcasters won carriage rights for new cable
13 channels, essentially, and so that itself also tended
14 to crowd out channel capacity on those systems.

15 So as systems grew, and they are growing
16 in capacity, of course, during this time, a lot of
17 that capacity is now eaten up, some of it eaten up by
18 these new networks often connected to retransmission
19 consent agreements.

20 JUDGE GULIN: What about with respect to
21 retransmission agreements with distant signals?

22 THE WITNESS: To my knowledge, there was

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1 not much bargaining that went on there, and I -- what,
2 if any, retransmission -- cable deals were struck on
3 that. The focus in the trade press -- I don't have
4 access to these contracts and what they got, and I
5 don't know what source you'd use for it except the
6 trade press.

7 The trade press has commented that in
8 local market negotiations that the upshot of, you
9 know, the bargains that were struck had low payments,
10 if any payments, for the local signals. But deals --
11 you know, Fox-owned stations, then getting agreements
12 for FX, which was a new network in 1993, you know, at
13 the time this initially started, things of that nature
14 -- you know, Fox owning FX, its new channel, and
15 getting an agreement to run FX on those cable systems,
16 and then assigning the rights reportedly, to my
17 recollection, without any payment for the Fox-owned
18 stations.

19 JUDGE GULIN: It would make sense, would
20 it not, that local stations would probably be less
21 likely to demand payment than a distant signal, I
22 would think, under retransmission consent. I mean,

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1 the local station would be more likely to want to have
2 its station carried locally, would it not?

3 THE WITNESS: Well, it would, but I
4 believe so would the distant signal. I don't see
5 exactly what the disparity is.

6 JUDGE GULIN: Well, I don't want to
7 prolong this, but the -- wouldn't the local signal
8 have local advertising, whereas the distant signal has
9 distant advertising? That's not going to benefit the
10 station that much.

11 THE WITNESS: So you think the distant
12 signal would want to -- would be more interested in a
13 fee rather than an advertising-supported model?

14 JUDGE GULIN: That may be.

15 THE WITNESS: I guess it depends on the
16 signal as well, if it's -- geographically what its
17 relationship is.

18 BY MR. COOPER:

19 Q Let me follow up on a couple of the issues
20 raised by Judge Gulin's question. First of all, I
21 think you were talking about the trade press had
22 reported with respect to local into local

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1 retransmission.

2 And I don't know that you ever got to
3 whether the trade press reported the general results
4 of local into distant retransmission consent
5 negotiations. Do you recall that?

6 A Yes. You did it the opposite way. I'd
7 say distant into local, but I guess it's the same
8 thing. Right. You just threw me.

9 I haven't been able to find that report.
10 As I said, I don't --

11 Q Are you aware of --

12 A I don't have these data.

13 Q Okay. The second question, just to follow
14 up on what Judge Gulin asked, was: would you expect
15 that the local signal would have more value to the
16 cable system in its local market than it would in a
17 distant market?

18 A Yes. I mean, all else equal, yes.

19 Q The second piece of legislation that you
20 mentioned was the Satellite Home Viewer Act. Can you
21 talk about how that -- what affects that had that
22 might be relevant to the fund here?

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1 A Well, the Satellite Home Viewer Act was
2 passed in 1994, and it essentially expanded must carry
3 by creating larger areas over which broadcast systems
4 would be eligible for must carry rights.

5 Q And if you look at page 20, I think
6 there's a graphical illustration of this point.
7 Table 1 -- can you just explain what the data shown
8 here show, and how they relate to the Satellite Home
9 Viewer Act?

10 A Right. We just looked for systems that --
11 correction, stations that were carried in 1992 with
12 positive DSEs, something greater than zero in terms of
13 what they accounted for as a distant signal but were
14 counted as zero distant signals in 1997.

15 And so we actually found 535 stations that
16 accounted for 303.5 total DSEs in 1992 that went to
17 zero in 1997. And this tends to show the effect of
18 the distant stations themselves, the distant stations so to
19 speak, being -- becoming local in 1997.

20 Q So this is following the same stations
21 over time and watching them go from distant or
22 partially distant to local?

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1 A Right. Right.

2 MR. COOPER: Let me get some guidance on
3 timing here, if I could, Judge von Kann. I'm about to
4 switch gears --

5 JUDGE VON KANN: Well --

6 MR. COOPER: -- to something that will be
7 -- I'm happy to continue on.

8 JUDGE VON KANN: About how much longer do
9 you think you'll be on direct?

10 MR. COOPER: Probably another half an hour
11 or something.

12 JUDGE VON KANN: Well, we've been about an
13 hour, but I -- I wouldn't mind, if we can go 'til 4:30
14 and finish the direct, or so, and take a break, but it
15 sounds like we won't quite make that.

16 MR. COOPER: We probably won't make that,
17 but --

18 JUDGE VON KANN: Why don't we go, say,
19 another 15 minutes --

20 MR. COOPER: Go for a while?

21 JUDGE VON KANN: -- or so.

22 MR. COOPER: Well, I've got another --

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1 I've got two more chunks here.

2 JUDGE VON KANN: Two more chunks. Well,
3 we can digest another chunk or two.

4 MR. COOPER: All right. That's fine.

5 JUDGE VON KANN: Okay.

6 JUDGE YOUNG: Before you go on, Mr.
7 Cooper --

8 MR. COOPER: Sure.

9 JUDGE YOUNG: -- I just want to make sure
10 I understood the last -- Table 1. These are stations
11 that previously have been carried as DSEs by various
12 cable systems?

13 THE WITNESS: Right.

14 JUDGE YOUNG: As a result of the change in
15 the definitions.

16 THE WITNESS: They're carried, but they're
17 not counted as distant.

18 JUDGE YOUNG: They're no longer carried as
19 distant.

20 THE WITNESS: Right.

21 JUDGE YOUNG: They're now carried as
22 local.

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1 THE WITNESS: Right.

2 MR. COOPER: If I could just follow up on
3 that, because I don't want to -- I want to make sure
4 you understand what it shows.

5 BY MR. COOPER:

6 Q Do you know for a fact that every one of
7 these instances is the result of the Satellite Home
8 Viewer Act, or is this table --

9 A No.

10 Q Okay.

11 A No.

12 Q Can you just explain --

13 A Right. This is something that -- I mean,
14 the Satellite Home Viewer Act was something that
15 happened sort of on its own. There is no way to
16 exactly square this with that, except to observe
17 what's happening in the marketplace over this period
18 '92 to '97 that is consistent with expanding the area
19 over which stations qualify for must carry.

20 Q But --

21 A And that's local -- in the local, so to
22 speak.

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1 Q Okay.

2 JUDGE YOUNG: So you looked at 535 that in
3 1992 were considered DSEs, but in 1997 were not?

4 THE WITNESS: Right. And a lot of those
5 are partials.

6 JUDGE YOUNG: Partial, yes.

7 THE WITNESS: Yes, partial DSEs, as you
8 can see, because they add up to considerably less than
9 535 DSEs.

10 JUDGE YOUNG: Right. And you're saying
11 that it could have been the change in the statute of
12 -- or maybe it wasn't, but at least it's coincident,
13 at the same time?

14 THE WITNESS: Right.

15 BY MR. COOPER:

16 Q Well, are there any other material
17 explanations, other than the statute, for this
18 behavior?

19 A I'd have to think about that. There may
20 be.

21 Q Let me just make sure, too, we're clear on
22 this --

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1 A Yes.

2 Q -- what a partial DSE is and how that
3 might relate to what we're observing here.

4 A Right.

5 Q Can you just explain why a distant signal
6 would be a partial distant signal?

7 JUDGE VON KANN: That's not like being a
8 little bit pregnant? It's different than something --
9 okay.

10 THE WITNESS: Partially distant. Cable
11 systems and the must carry contours essentially
12 operate on different maps. And so you can have some
13 broadcast signals that are local in part of the cable
14 system and distant for other parts of the cable
15 system. And so to get the DSE calculation on that,
16 you pro rate, you know, by subscribers those portions
17 of the cable system.

18 BY MR. COOPER:

19 Q So a partially distant signal is -- at
20 least part of it is within its home base.

21 A Right.

22 Q Okay.

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1 JUDGE VON KANN: I've been trying to think
2 as the hearing has gone on whether it would be humanly
3 possible to construct a more complicated system.

4 (Laughter.)

5 And I think it probably is, but I haven't
6 quite figured out how at the moment, so --

7 MR. COOPER: Well, you know there's CARP
8 reform pending, right?

9 (Laughter.)

10 I'm sure we'll find out.

11 JUDGE VON KANN: Okay.

12 BY MR. COOPER:

13 Q You mentioned one thing. Another thing I
14 want to make sure I clear up -- you mentioned must
15 carry in connection with this idea of partially
16 distant.

17 A Right.

18 Q How would must carry tie in? That
19 suggests that there might be a connection between must
20 carry and some instances of distant signals. Can you
21 just explain how that happens?

22 A Yes. Well, so you have a situation where,

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1 say, a system is carried half and half locally. And
2 that is to say, it counts -- it's a non-network
3 distant signal for half of the subscribers, so it
4 counts as half a DSE. The other half of the cable
5 system -- it's a distant DSE.

6 Sorry, it was local for the first half,
7 and distant for the second half, so it's a half a DSE.

8 Then, you change the definition -- and
9 this happened under must carry, but -- it happened for
10 must carry, but it changed the definition of what a
11 local signal was. So you moved back. You know,
12 suppose now the signal is entirely local because you
13 have a larger area for the definition of what's a
14 local signal. So now you go down to a zero DSE for
15 that particular signal.

16 Q But I want to focus you just on must
17 carry.

18 A Oh.

19 Q Is it the case that where a signal is
20 partially distant, does -- can must carry still be
21 implicated?

22 A Yes.

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1 Q What part of the signal would that be?

2 A Well, the cable operator has to bring in,
3 under must carry, has to bring in that signal for that
4 part of the market. And if the other part -- if that
5 station wants carriage, it has to then compensate the
6 cable system for any copyright liability it has in the
7 other part of the market to be brought in and carried
8 on the system.

9 Q Okay. Do you know whether, in fact,
10 stations do compensate for that copyright exposure?

11 A I haven't seen what the compensation is.

12 Q All right.

13 A I know they have liability for doing it.
14 I don't know what --

15 Q But do you know whether the systems ever
16 collect that?

17 A I don't -- I haven't seen that -- those
18 data, no.

19 JUDGE YOUNG: Just so we understand that
20 -- so you have a system -- a cable system for which a
21 local broadcaster -- which a broadcaster can be
22 considered local for half that system, and because the

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1 broadcast is considered local for half that system,
2 it, under the '92 Act, has must carry rights. And it
3 exercises those rights.

4 THE WITNESS: Yes.

5 JUDGE YOUNG: Because it exercises those
6 rights, it could be that the system has to use it as
7 a distant signal also.

8 THE WITNESS: Right.

9 JUDGE YOUNG: And under those
10 circumstances, the system then has a right, if it
11 wants to exercise it, to get reimbursed for the
12 compulsory license it would have to pay?

13 THE WITNESS: Yes.

14 JUDGE YOUNG: Okay. That's --

15 THE WITNESS: From the station. Yes, from
16 the station.

17 JUDGE YOUNG: I should be looking --

18 (Laughter.)

19 I think we just found the added
20 complication.

21 (Laughter.)

22 There's probably a lot more.

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1 JUDGE VON KANN: It'll probably get worse.

2 (Laughter.)

3 BY MR. COOPER:

4 Q Let me turn to another topic here, which
5 is the second category of changes that you discuss in
6 your report, and I think you've labeled those as the
7 superstition changes. And before we sort of look at
8 that, I think it would be useful, actually, to go to
9 the Appendix D, which is the last two pages in the
10 tab. Do you have that in front of you?

11 A Appendix D?

12 Q Appendix D, the --

13 A D as in David, yes.

14 Q Yes, the carriage of distant signal table
15 there. I'd like to just go through this, so we can
16 make sure we understand the data here with respect to
17 instances of carriage. If you could -- if you could
18 start by looking at the last box there that's labeled
19 "All," which is on the second page.

20 A Right.

21 Q First of all, and this is set forth in
22 your notes, but could you just briefly explain what an

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1 instance of carriage is, and then what full, partial,
2 and total measure?

3 A Well, full carriage, again, is the station
4 is carried everywhere. Partial is it's carried not
5 everywhere, but in some places. So the total is just
6 totaling those. And, of course, DSE adjusts for
7 partials plus for the discount, so to speak, in
8 calculating DSEs put in for network program of
9 television. And so that adds up total DSEs by year,
10 '92, '97, '98, and '99.

11 Q So for full, each number there under the
12 "full" would be one instance of a distant signal that
13 is carried entirely on a distant basis?

14 A Yes.

15 Q Okay. And then partial, the numbers there
16 would be one for each distant signal carried partially
17 on a distant basis.

18 A Correct.

19 Q Okay. And then the DSE number would
20 account for -- I think you mentioned the different
21 rates in the statute or in the --

22 A Yes.

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1 Q Okay.

2 A In the rate schedule.

3 Q Right.

4 A In the payment schedule.

5 Q Okay. If you turn now back to the front
6 -- I'm sorry, to the first page of this appendix and
7 we look at WTBS, you see the first line there shows
8 the full carriage of TBS across time. And can you
9 just explain what the numbers show there?

10 A Yes. WTBS had over 2,100 instances of
11 full cable carriage, cable systems carrying WTBS
12 throughout their systems, in 1992, over 2,200 in 1997,
13 and then it essentially goes to zero in '98 and '99.
14 And, you know, the totals follow. They have very
15 little partial coverage, and --

16 Q Okay. Well, we'll talk about what
17 happened to WTBS in just a second.

18 The second block is WWOR. There's a
19 similar drop off, although fewer -- from fewer
20 instances of carriage. Can you just explain that?

21 A Right. Well, yes, WWOR -- 460 instances
22 of full carriage in 1992. And that drops off in 1997

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1 to just 25 and stays there for the next two years.

2 Q WGN -- what happens with WGN over time?

3 A WGN actually starts, you see, at about
4 1,250 in 1992, and actually increases to about 1,350
5 in '98 and '99.

6 Q The next block says educational. Do you
7 see that?

8 A Correct.

9 Q And what does that data show?

10 A That on the instances of full carriage,
11 where the stations are carried everywhere, they are
12 distant signals everywhere they're carried, goes from
13 430 down to 398 in -- 430 in 1992 down to 398 in '98
14 and up to 412 in 1999. So there's sort of a soft
15 decline over the period.

16 Partial's go up quite a bit from 108
17 instances of partial carriage in 1992 to about 187 in
18 1999 -- '98 and '99.

19 Q And what happens with the DSEs? Are they
20 relatively constant?

21 A Yes, the DSEs do stay -- you know, start
22 at 116 and 117 and go to 119, 120.

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1 JUDGE VON KANN: Who is embraced within
2 educational? I think I know, but I want to be sure.

3 THE WITNESS: Who is embraced?

4 JUDGE VON KANN: Yes. What does
5 "educational" refer to?

6 THE WITNESS: Oh, public television
7 stations. Sorry.

8 BY MR. COOPER:

9 Q And can you just summarize what you see in
10 the Canadian data in the next block?

11 A Again, the Canadian stations -- instances
12 of carriage start at about 78 in 1992 and full -- full
13 carriage declines in 1999 down to 59. DSEs also fall
14 from about 83 to 67 over the period.

15 Q If I can just -- if you could look back at
16 the educational block, do you have any explanation for
17 why the number of partial educational signals grows so
18 rapidly between 1992 and 1997?

19 A Well, this may be related to the fact that
20 you're changing local definitions. You're changing
21 the lines for -- you know, for the must carry. And so
22 you tend to get more of -- what you see when you see

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1 the partial, it's local in part and distant in part.

2 And so when you change the line you can
3 get, you know, higher partials, and in this case it
4 may be that there are more must carries that are
5 coming in that are just a partial must carry, because
6 of that expanding definition of what constitutes a
7 must carry responsibility.

8 Q What about the original creation of must
9 carry? Could that have any role here as opposed to
10 just the expanding definition of must carry?

11 A I'm sorry. The original creation of must
12 carry?

13 Q Well, the creation of must carry in the
14 '92 Cable Act. Could that play any role in this?

15 A That they were -- no, that doesn't -- I
16 don't exactly understand the -- where that would come
17 in.

18 Q Okay. Let me ask you about the next page,
19 then. If you could just summarize what you see in the
20 network block of data there.

21 A Yes. In the network, again, you start
22 with, in 1992, having about 1,100 instances of full

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1 carriage. You're going down to 770 instances by 1999,
2 I guess going to 718 in 1998, coming up a little bit
3 in 1999, and DSEs also go down from about 320 to 236.

4 Q Okay. If I could -- at this point, I'd
5 like to then go back to the section of your report
6 that deals with the -- what you've labeled the
7 superstition effects.

8 A Right.

9 JUDGE YOUNG: I'm sorry.

10 MR. COOPER: Sure.

11 JUDGE YOUNG: I'm a little confused with
12 the networks. I thought the networks are not part of
13 this proceeding.

14 JUDGE VON KANN: Who does "networks" refer
15 to I guess might be a good starting point.

16 JUDGE YOUNG: Well, that's a better way to
17 ask the question.

18 THE WITNESS: Well, you can bring in
19 network signals, distant network signals, at a
20 discount. But they're not a program -- it's for the
21 local programming essentially. That's why they only
22 have a 25 percent count on their signal. That's

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1 supposed to be for the locally-produced information or
2 programming on that signal. So the signals are there,
3 but the owners of the network programming are not
4 claimants.

5 JUDGE YOUNG: I mean, there are -- if you
6 look at '92, then, there are 1,101 instances where a
7 cable system operator is carrying as a distant signal
8 some network program?

9 THE WITNESS: Yes. Distant signal full,
10 yes, but it's full, not partial, yes.

11 BY MR. COOPER:

12 Q An example of that would be like a network
13 affiliate that is brought in on a distant basis?

14 A Yes.

15 MR. COOPER: I'm sorry. Are you done with
16 that area?

17 JUDGE YOUNG: No, I got it.

18 MR. COOPER: Okay.

19 BY MR. COOPER:

20 Q Let me take you back, then, to the -- you
21 talked about the -- what you labeled the superstation
22 effects.

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1 A Yes.

2 Q Can you just describe what we're talking
3 about there?

4 A Yes. As you can see by some of the
5 numbers we've just taken a look at, in essence, the
6 removal of WWOR and WTBS from the distant signal mix,
7 in 1997 for WWOR and in 1998 for WTBS, had major
8 impacts on the size of the fund.

9 Q Okay. You may have said this before, but
10 why is WWOR, for starters, removed from --

11 A Well, it lost or did not renew, or I don't
12 exactly understand what the contractual situation was,
13 but it ceased to be distributed by satellite, which is
14 the standard, efficient way to distribute these
15 signals to the thousands of cable systems across the
16 country.

17 Q Okay. And I think when we looked back at
18 Appendix D we saw that that was about 460 instances of
19 carriage in 1992?

20 A Correct.

21 Q And if you look at -- well, first of all,
22 you mentioned this but just to be clear, what happened

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1 with WTBS?

2 A Well, they, in essence, withdrew from the
3 superstation model and became a cable channel and now
4 negotiate directly with cable television systems to
5 distribute what they call TBS.

6 Q Okay. And if you look at page 22 -- and
7 I don't have a slide for this, but it's in your report
8 -- page 22, Figure 6, what does that show in terms of
9 the superstation effects?

10 A Well, the elimination of the superstations
11 would have an important impact on the funds by
12 lowering the DSEs that are paid -- lowering the DSEs
13 on which cable systems pay into the royalty funds. So
14 here we can see that the average -- this is per system
15 now -- average Form 3 DSEs go from about 2.5 in the
16 second half of 1992 to just under 2.0 in the second
17 half of 1997, and then down to just under 1.3 in the
18 second half of 1998.

19 And the WTBS effect is between '97 and
20 '98, and I believe that that difference in DSEs is
21 largely accounted for by the removal of WTBS from the
22 distant signal market. Prior to that, in 1997, you

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1 have the withdrawal of WWOR, and that accounts for a
2 lot of the drop, although there are other factors.

3 These other legislative factors are in
4 there between '92 and '97 as well. And so I have to
5 differentiate between those two sides of the coin, so
6 to speak, during that period.

7 But to answer the question about
8 superstations, the withdrawal of both or either WWOR
9 and WTBS drives down the DSEs, and driving down the
10 DSEs, of course, drives down payments into the fund.

11 Q Okay. In your analysis, did you account
12 separately for the Basic Fund and the 3.75 Fund?

13 A Yes.

14 Q If you look at page 25, Figure 7, can you
15 just explain what this figure shows?

16 A Yes. This is the Basic Fund, and now
17 we're looking at the actual -- you know, decomposing
18 the total funds, essentially looking at the two big
19 contributors, the Basic Fund and the 3.75 Fund.

20 So this is the Basic Fund. It starts in
21 1992 at about \$143 million. I should note that Form 1
22 and Form 2 systems are the base -- if I can use this

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1 little laser pointer -- this is the base down here,
2 and the same -- we just, again, then add in the same
3 Form 1 and Form 2 payments down there.

4 But this fund was \$143 million in 1992.
5 Projecting just a 24 percent increase for Form 3
6 subscribers gets that fund up to about \$176 million in
7 1998. Of course, the 1998 total is only about
8 \$98.2 million. And so I call this differential
9 approximately a \$78 million shortfall.

10 Q Okay. And I think we've gone over
11 basically the causes in your report, discussed in your
12 report, of the shortfall. But I want to break them
13 down here. If you --

14 JUDGE VON KANN: Mr. Cooper, is this a
15 good place to break, since you mentioned break?

16 MR. COOPER: It's fine.

17 JUDGE VON KANN: Is this as good as any?
18 Okay. Why don't we take 15 minutes now and come back
19 and find out the breakdown after the break.

20 (Whereupon, the proceedings in the
21 foregoing matter went off the record at 4:34 p.m. and
22 went back on the record at 4:50 p.m.)

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1 JUDGE VON KANN: Okay.

2 BY MR. COOPER:

3 Q Dr. Hazlett, before our break, at some
4 point I think we had talked about the, we were
5 focusing on the Basic Fund. We had talked earlier
6 about the reduction in the royalties as a result of
7 rate regulation.

8 I want to focus you now on the reduction
9 as a result of the drop in DSEs. And if you turn to
10 Page 28 of your report, Table 2, it has entries there
11 -- it's Page 28. Do you have it there?

12 A Yes.

13 Q It's entitled Effective DSE Reductions on
14 the Basic Fund, and it has an entry for legislative,
15 WWR and WW, or WTBS. Could you just explain those
16 three, legislative, WR and TBS?

17 A Right. The legislative changes involve
18 rate, the three things from the '92 Cable Act, plus
19 the '94 Satellite Home Viewer Act.

20 The three items in the, of importance in
21 the '92 Cable Act involve rate regulation, must carry
22 and retransmission consent. And then the removal of

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1 WWOR straightforward is the WTBS.

2 Q But here on this line of, this line,
3 legislative changes, is this just, is this just the
4 results of must-carry or does this include rate
5 regulations?

6 A This includes all the different
7 legislative defects.

8 Q This, it does on this table, the DSE
9 decline?

10 A Oh, oh, I'm sorry, the DSE decline, no, it
11 does not. The reduction due to rate regulation is
12 indicated elsewhere. I'm sorry.

13 Q If you look at Page 29, Figure 9, I think
14 this summarizes the results with respect to the Basic
15 Funds. Can you just explain what this pie chart
16 shows?

17 A Sure. What I do is sort of decompose this
18 shortfall of about 78 million dollars in the Basic
19 Fund between '92 and '98, is I first look at the
20 effect of, the simple effect of the reduction of the
21 basic rate.

22 The reduction of the basic rate we saw

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1 earlier was from about \$16.00, average rate per
2 subscriber, to about \$13.00. And that's about a 19
3 percent drop.

4 And if you, so going to the base line
5 projection, that, the effect of that is just to reduce
6 the funds, the Basic Fund here by 19 percent, because
7 you're reducing the base on which you calculated by 19
8 percent.

9 So that rate reduction, when you apply
10 that to the projected bench mark of about 175 million,
11 gives you this reduction of 32 million dollars. Now
12 that explains 32 of the approximately 77, 78 million
13 dollar shortfall.

14 The remaining amount of the shortfall is
15 explained by reductions in DSEs. And so I decompose
16 the DSE into three different effects. And the three
17 different effects are in this table on Page 28.

18 The legislative changes, not including
19 rate regulation. The legislative effects being
20 retransmission consent, must-carry and the Satellite
21 Home Viewer Act expanding the must carry territories.

22 And the WWOR loss, the WTBS loss and what

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1 I do is I break this down, break down the
2 approximately, well, 30, about 45, 46 million dollars
3 that's remaining in the shortfall between these
4 various three categories based upon the reduction in
5 DSEs.

6 Q Thank you. I'd like to turn to --

7 JUDGE VON KANN: This shortfall is for
8 that entire period from '92, through '98, is that
9 right?

10 THE WITNESS: Well, the DSEs decline, as
11 shown on, as shown on Page 26, Figure 8. The average
12 DSE per subscriber declines as shown in Figure 8, for
13 the Basic Fund.

14 The way this was calculated, in terms, to
15 try to isolate the three different impacts here, is as
16 follows.

17 JUDGE VON KANN: My question is, I just,
18 I think it's a little narrow. That figure, 43.5
19 million, as I understand it, is the, is the cumulative
20 effect of the shortfall in '92, '93, '94, '95 -- no?
21 Or is that per --

22 THE WITNESS: Yeah, for, for the

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1 legislative effects, yes.

2 JUDGE VON KANN: Through that period?

3 THE WITNESS: Correct.

4 JUDGE VON KANN: And that, that, that
5 relates to six years that we're not dealing with here.
6 Ninety-two through '97, we're not allocating, right?
7 We're only concerned --

8 THE WITNESS: Well, no, no. This, no, I'm
9 sorry. This is a reduction in the Fund in 1998.

10 JUDGE VON KANN: Oh, it is --

11 THE WITNESS: I'm sorry, I'm sorry, it's
12 not cumulative over that time period.

13 JUDGE VON KANN: Okay. The reasons are
14 cumulative?

15 THE WITNESS: The reasons are cumulative,
16 that's right.

17 JUDGE VON KANN: Okay, fair enough.

18 THE WITNESS: I'm sorry.

19 BY MR. COOPER:

20 Q If we could look now at your analysis on
21 the 3.75 Fund. Page 31 has, first of all, the slide,
22 I believe, that shows the shortfall? Do you see that,

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1 Figure 10?

2 A Yes.

3 Q And what does that show?

4 A Well, the 3.75 Fund, as you can see, had
5 a much bigger decline than the Basic Fund, in
6 percentage terms. And in '92, it goes from about 45
7 million dollars.

8 If it grew at, just with subscriber
9 growth, 24 percent, it would be up to 56 million in
10 1998. Instead it's down to just 10 million dollars,
11 so there's a 46 million dollar shortfall there that I
12 decompose or deconstruct into the component parts.

13 Q Okay, looking first at the effects of rate
14 regulation, if you'd look at Page 33, Figure 11, could
15 you explain what that shows?

16 A Yes. How the, the Form 3 receipts for the
17 systems that had participated in the 3.75 Fund, were
18 different from the, I should say the basic rate
19 charged upon which gross receipts are calculated, was
20 different for those minority of systems that
21 participated in the 3.75 Fund.

22 You can see in 1992, the second half, the

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1 Basic Rate, on average, was \$13.20. That did go down
2 under the rate regulation regime, but the drop in
3 rates is much less.

4 Here it is about eight percent, rather
5 than the 18 percent seen before.

6 Q And then, I think there's not a graphic
7 for this, but you discuss underneath that, on Page 33,
8 and on to 34, DSE reductions seen in the 3.75 Fund.

9 And it's summarized on Figure 12, which is
10 on Page 34, if you could just look at Page 34.

11 JUDGE GULIN: Is that a typo on here? Is
12 this a summary for just 3.75?

13 THE WITNESS: It should be.

14 JUDGE GULIN: Okay, so on the second line
15 under summary it says, it talks about changes on the
16 Basic Fund. Should that be 3.75 Fund?

17 THE WITNESS: Yeah, I believe so. Thank
18 you.

19 BY MR. COOPER:

20 Q Dr. Hazlett, could you explain Figure 12,
21 there?

22 A The Figure 12, again, takes into account

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1 the legislative effects. The portions the shortfall
2 seen, that 46 million dollar shortfall seen in the
3 3.75 Fund and it apportions them to the legislative
4 effects, the effect of WWOR being taken out of the mix
5 in '97, and then the effect of WTBS being removed in
6 1998.

7 And you can see that WTBS has a very
8 substantial effect on the 3.75 Fund. WOR still has
9 also a fairly substantial effect. The legislative
10 effects are smaller in the 3.75 Fund.

11 Q And I take it then that the --

12 A Proportionately.

13 Q Yeah. That then it follows that the
14 effects of TBS and WWOR dropping out are greater?

15 A Yes, as a proportion of that explaining
16 that shortfall.

17 Q I'd like to switch gears a little bit, Dr.
18 Hazlet, and then turn to the next section of your
19 report which begins on Page 35. Can you just take us
20 through it.

21 Divide it into an assessment of the
22 legislative changes and Super Station changes. If we

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1 could start with the legislative changes, can you
2 explain or summarize what this section of your
3 testimony says?

4 A Well, the legislative effects, you know,
5 had a very general, caused a substantial reduction in
6 both the Basic Fund. Overall, I find that most of the
7 reduction in the Basic Fund is attributable to
8 legislative effects.

9 A lesser impact, yet still substantial in
10 reducing the Basic Fund. And this was an effect that
11 brings down, basically, the, you know, in terms of the
12 shares, brings down the entire fund.

13 Q Just so the record is clear, I think, you
14 used the term Basic Fund twice.

15 A Oh, Basic and 3.75.

16 Q Yeah. So just, could you just explain
17 that again and make sure we've got it clear?

18 A Yeah. So the legislative effects have a
19 very substantial effect on the Basic Fund. More than
20 half of the shortfall in the Basic Fund is
21 attributable to legislative effects.

22 The 3.75 Fund is also reduced,

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1 importantly, by the, by 27 percent of the shortfall in
2 the 3.75 Fund, is also caused by legislative effects.
3 So these legislative effects are important and they,
4 they have a decided effect in reducing the total level
5 of funding compared to what it would be if those
6 legislative effects had not taken place, and things
7 had just sort of moved forward as the were in 1992.

8 Q Does that, does that have any relevance to
9 the share allocations that the panel has to deal with
10 here?

11 A It would, it would tend to have sort of
12 generic effects on the, on the size of the fund,
13 bringing everything down together. What you can say,
14 however, is that these legislative effects certainly
15 did benefit and were sought by, because of that
16 benefit, a distinct category of claimants.

17 And that is the commercial broadcasters
18 and the public broadcasters, which certainly wanted
19 and were leading champions of the 1992 Cable Act, and
20 wanted policies such as rate regulation and
21 must-carry.

22 Q How is that relevant to what the panel has

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1 to do?

2 A Well, as you can see when you go through
3 this, the copyright funds were reduced substantially
4 by things like rate regulation. And in the market for
5 this programming, on the distant signals, you have,
6 you know, a group of claimants that is pursuing,
7 basically, their objectives in the marketplace,
8 willing to see a reduction in the funds here to obtain
9 other things.

10 Most notably, cable carriage and, in
11 essence, an increase in competitiveness against other
12 forms of programming like cable, cable-only networks
13 on cable systems.

14 Q Let me ask you about, with respect to the
15 Super Station changes, which I think you discuss
16 starting on Page 39 of your report. What relevance,
17 if any, do those have to the panel's issue here?

18 A Well, the, yeah, the Super Station, Super
19 Stations were withdrawn clearly depleted the fund to
20 a substantial degree. One of the things, of course,
21 in terms of share allocation that's involved here is
22 the fact that the Super Stations did feature

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1 programming from several of the claimants, the
2 programming claimants, including, of course, Joint
3 Sports and the program suppliers, commercial tv,
4 devotionals and music.

5 And, to the extent that these claimants
6 had programming on these Super Stations, you know,
7 they would sort of tend to lose that programming as a
8 group.

9 Q Let me, if I can direct your attention to
10 Page 40, the first full paragraph there. It starts
11 out, the Public Television Claimants present the more
12 subtle issue.

13 A Right.

14 Q Can you just explain what your point is
15 there?

16 A Well, it's essentially a logical point
17 that the, to the extent that the Public Television
18 Claimants, well to the extent that public television
19 programming is identifiable as a program source in the
20 contribution to the royalty tribunal as, as indicated
21 in the, the CARP's previous or the CRT's previous
22 decision in 1992, that about 2.1 percent of basic

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1 royalties were generated by the carriage of
2 non-commercial signals.

3 And to that extent, the award to, to the
4 owners of programming on those signals of
5 substantially more than that, that percentage,
6 effectively gave a claim to other programming by these
7 program owners.

8 And the other programming, just by sure
9 volume of where the payments came from in the 1992,
10 proceeding, about 80 percent of the revenues were
11 accounted for by Super Stations.

12 By that fact, that percentage claim that
13 was awarded had, it essentially was, had a claim on
14 the Super Station generated revenues. And to the
15 extent that the Super Station revenues go down then,
16 or, correction, the revenues in the funds, the funds
17 in themselves go down because withdrawal, then that
18 share is, that claim goes down with the withdrawal of
19 those funds.

20 The source of those funds goes down, the
21 share stays the same and the claim goes down with the
22 other claimants. In other words, if Public

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1 Television, in essence, was a, had a claim on those
2 Super Station generated funds, and it might be seen as
3 one of the program, you know, suppliers that was
4 therefore compensated by those funds.

5 Q I'm just going to anticipate some
6 questions here, because it's been a subject of some
7 discussion. You see there's a parenthetical in the
8 middle of that paragraph.

9 You've got the 5.75 of Basic Fund as
10 compared of 2.1 percent in basic royalties generated
11 by the carriage of non-commercial signals. Do you see
12 that?

13 A Yes, Yes.

14 Q Did you calculate that 2.1 percent figure?

15 A No.

16 Q Where did you get that figure?

17 A Well, that's, yeah, that's the previous
18 report. The 1992 report.

19 Q And you took that out of the CARP report?

20 A Yes.

21 MR. COOPER: Okay, we have nothing further
22 at this time.

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1 JUDGE VON KANN: Okay, who is --

2 MR. OLANIRAN: Program Suppliers have no
3 questions.

4 JUDGE VON KANN: All right, okay.

5 MR. STEWART: We have a few.

6 JUDGE VON KANN: All right, well --

7 MR. COOPER: Can I just ask -- I think he
8 has more than a few and I just wondered what our plan
9 is going to be. We're going to go another 15 minutes
10 tonight, rather than have him be under 15 minutes of
11 cross, we might ask that we stop it if we're going to
12 go longer.

13 JUDGE VON KANN: Well, let's take stock.
14 Because I remember this witness was scheduled to carry
15 over until tomorrow and I don't think we have anybody
16 else on for tomorrow.

17 So I guess the question is whether we have
18 more than eight hours of cross coming or not. Do we,
19 Mr. Stewart and colleagues, have we got any sense of
20 about what the projection is?

21 MR. STEWART: I hate to announce this but
22 I believe I'll have more than four hours of

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1 questioning for him.

2 JUDGE VON KANN: Okay. And Mr. Hester?

3 MR. HESTER: Your Honor, I don't think I
4 will be longer than an hour and a half or maybe less,
5 depending on what Mr. Stewart covers.

6 JUDGE VON KANN: All right. Music
7 claimants have some questions?

8 MS. WITSCHER: Very brief, if any.

9 JUDGE VON KANN: Canadians?

10 MR. SATTERFIELD: Probably relatively
11 brief.

12 JUDGE VON KANN: Bigger than a bread box,
13 smaller than a battleship, is that it? And, of
14 course, there may be some redirect and there may be
15 some panel questions.

16 I guess my thought would be -- we began
17 this session at 4:50. Maybe if we went until, I don't
18 know, 5:45, or something like that, got a half an hour
19 in and then break for the day?

20 Does that seem, we don't have to, I think,
21 break our necks to go way late today. But maybe we
22 ought to get at least an hour in this last segment.

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1 Well, John is suggesting we could, if we
2 end up with extra time on our hands, we could address
3 tomorrow some of the things we were going to do
4 Wednesday.

5 But my hunch is we won't have a huge
6 amount of time left over, but if we do, we can, I
7 guess.

8 MR. COOPER: Well, just to be clear, and
9 I understand the panel's problems. Our concern is
10 only that if we can do what we need to get done
11 tomorrow, without having to go late and to have half
12 an hour of cross tonight would mean we couldn't talk
13 to Dr. Hazlet at all, whereas, we wouldn't really be
14 benefiting the proceedings that much.

15 That's our issue, but we're happy to, you
16 know, do --

17 JUDGE VON KANN: I have a sneaking
18 suspicion Mr. Stewart might have a solution to that.

19 MR. STEWART: Well, I would be happy to
20 start tomorrow morning as long as it's clear we're
21 going to have the time tomorrow to finish everybody's
22 cross.

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1 And if we could go late tomorrow, for
2 example, if necessary, then that solves the problem
3 from my perspective.

4 JUDGE VON KANN: How does that work for
5 you, Mr. Cooper?

6 MR. COOPER: That's fine.

7 JUDGE YOUNG: Aren't your Wednesday
8 witnesses also available tomorrow?

9 MR. COOPER: No. Well, no, not for any
10 practical -- they're flying in in the afternoon at
11 some point.

12 JUDGE VON KANN: Let me just ask one very
13 quick question that will save us a little bit of time
14 tomorrow, because it will help me maybe understand a
15 bit more of the cross that's coming.

16 On, if I can find it here, on top of Page
17 37, in your testimony, Dr. Hazlet, you say, as also
18 discussed above, in 1998 Cable Royalty Fund was
19 approximately 56 million dollars less than it would
20 otherwise have been absent the legislative changes.

21 And I was flipping back to find the above
22 reference that explained that and I haven't

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1 immediately found it. But I can't -- John or whoever
2 was doing the Power Point, could we put Figure 3 back
3 up for just a second?

4 And let me ask one question about this.
5 You may have to move that, I'm sorry to tell you.

6 THE WITNESS: Did you want me to clarify
7 the above on this?

8 JUDGE VON KANN: Well, if you know where
9 it is, yeah, if you can point out where it comes from.

10 THE WITNESS: Well, yeah, I don't think it
11 was put together above --

12 JUDGE VON KANN: Okay.

13 THE WITNESS: -- but you see Footnote 32?

14 JUDGE VON KANN: Yes, okay, all right.

15 THE WITNESS: That referencing the two
16 estimates.

17 JUDGE VON KANN: Okay, and that will be
18 fine.

19 THE WITNESS: Okay.

20 JUDGE VON KANN: Now, let me see if we can
21 put footnote or Figure 3 up there. Okay, that's,
22 sorry. Now, this figure, which is on Page 12 of your

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1 testimony --

2 THE WITNESS: Right.

3 JUDGE VON KANN: -- I looked at a little
4 bit. And here's my question and maybe you can help me
5 understand. We have this block on the left, the green
6 block which says legislative changes.

7 THE WITNESS: Right.

8 JUDGE VON KANN: And, in deed, the actual
9 amount of the total fund royalties do start declining,
10 it looks like about the middle of 1993, there.

11 THE WITNESS: Right.

12 JUDGE VON KANN: They seem to go down
13 pretty sharply until, it looks like, about the middle
14 of '94, when they start rising again. And, in deed,
15 it looks to me like in about the middle of '95, the
16 rise gets even steeper than the rise in the baseline.

17 And I simply took a straight edge and
18 projected out those two lines. And, to me, they come
19 closer and closer together. So that by about 1998, I
20 get them at about 20 to 25 million dollars apart, not
21 56 million dollars apart.

22 Now, admittedly, I'm sure this graph is

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1 not that precise that we can, but that's a significant
2 variation. And so I'm a little bit perplexed because
3 it appears to me that the effects of the legislative
4 changes were dissipating and that the actual royalty
5 total was catching up with the baseline such that by
6 1998, it was much closer to 20 or 25 million dollars
7 short, not 56 million.

8 So maybe I'm misreading this chart or I'm
9 misunderstanding your testimony. Do you have any --
10 but that's the effect of the Super Station stuff. I'm
11 focusing on this effect.

12 And I'm looking at -- whoa, sorry. I'm
13 looking at the reference to this, yeah. As discussed
14 above, the 1998 Cable Royalty Fund was approximately
15 56 million dollars less than it would have been absent
16 the legislative changes.

17 So I'm focusing on that assertion of a 56
18 million dollar legislative impact which doesn't look
19 to me like it's quite in accord with this chart. But
20 I may be misunderstanding something.

21 THE WITNESS: Well, yeah, there are
22 obviously a lot of things going on here.

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1 JUDGE VON KANN: Okay, fine.

2 THE WITNESS: And so just taking, yeah,
3 taking any one slope and extending it out,
4 extrapolating, is hazardous. And there's, you know,
5 you can see that '94 to '96, there is some gains in
6 the fund, obviously, that's why, you know, I have it
7 up here to show what's happening.

8 These legislative changes don't just hurt
9 the fund, by the way, in the '92 to '94 period.
10 They're, they're still out there, sort of the gift
11 that keeps on giving.

12 The reduction in that basic rate, that I
13 attribute to the rate regulation and the change in the
14 tiering structure, after the '92 Cable Act, clearly is
15 something that is hurting revenues in 1998, and it's
16 hurting the revenues conservatively calculated the way
17 I did it.

18 That is to say that whatever is happening
19 in that, in that uptrend in '94 and '95, or '95/'96
20 period, you'd have, if you had higher rates, basic
21 rates, pre-rate regulation, in the '92 Act, you'd have
22 a lot more going on in terms of your revenues right

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1 there.

2 And all I'm accounting for right here is
3 an increase in the baseline for subscriber growth.
4 That's it. I just took that baseline revenue number
5 an implicitly the rate charged for basic and all I did
6 was let it grow at, you know, zero inflation out to
7 1998.

8 If you had other things going on, maybe,
9 you know, some basic rate increases in there, you
10 could have, you could have a much higher baseline. So
11 I didn't do that because I wanted to make a
12 conservative estimate of this.

13 And so what you are seeing there, though,
14 you are seeing something happening, you know, '93,
15 '94, and you see something happening '96, '97, that
16 looked pretty distinctive.

17 And that's the thing to get away from
18 that. Relating it to this baseline that I've drawn
19 here --

20 JUDGE VON KANN: The thing that's
21 happening in '96/'97, which does indeed produce a
22 dramatic downward trend of that pink line. Is that,

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1 is that change in direction of the line a product of
2 the Super Station changes at WWOR and WTBS?

3 THE WITNESS: Most certainly, yes.

4 JUDGE VON KANN: So is it reasonable to
5 assume that if there hadn't been the changes in WWOR
6 and WTBS, that the pink line would have continued on
7 its trajectory?

8 THE WITNESS: You have to be very careful
9 with that assumption because you want to compare it to
10 the baseline, but the baseline has very conservative
11 assumptions in it about revenue growth in the systems.

12 I can strain the revenue growth to zero,
13 to the 1992, rate. And so, on this very conservative
14 calculation you have to be careful about saying that
15 that would have wiped out the differential caused by
16 the legislative changes.

17 This is a very conservative calculation
18 and so that's why I did not do it that way.

19 JUDGE VON KANN: Okay, well I think I'll
20 leave the matter there. It's possible that someone
21 might pick it up. We'll see. But let's, let's, oh,
22 yeah.

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1 JUDGE YOUNG: I think this is actually to
2 Mr. Hester. The witness just referred to the 2.1
3 percent of the funds related to the importation of
4 public television stations.

5 And that was found during, by the 1990 to
6 '92, CARP. Is it in your direct case they pretended
7 to the funds attributable to Public TV during '98 or
8 '99?

9 MR. HESTER: I don't think we do have that
10 number in. There was actually a fair amount of
11 discussion in the last case about the point that you
12 couldn't come up with a precise number and it gets
13 more complicated even during this period because you
14 have quite a few systems that have a minimum DSE they
15 are carrying as a Form 3 system.

16 They are paying the minimum DSE whether or
17 not they are carrying a signal, so it gets quite
18 complicated to know. There was a lot of debate over
19 that number in the last case and that was kind of a
20 bracketed number.

21 But we have not calculated the number. I
22 think, I mean, in candor, as I recall it, I don't

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1 think we ultimately disputed that two percent number.

2 You know, I think we'll spend some more
3 time talking about why that shouldn't determine value
4 and that was in the last case.

5 JUDGE YOUNG: Okay, so the debate actually
6 that occurred between yourself and Dr. Crandall about
7 whether or not you could calculate that, that's
8 consistent with what you just said.

9 MR. HESTER: Yes, I mean there was debate
10 in the last proceeding and I think the question to the
11 witness just now was very carefully put in terms of
12 the panel made that finding.

13 It is complicated, I suppose one can make
14 simplifying assumptions and say, well, it couldn't be
15 higher than x, whatever x would be. And then the
16 question is, well, should that constrain the award?
17 That was the debate in the last case.

18 JUDGE YOUNG: So when Mr. Trautman the
19 other day was making, he was talking about two percent
20 of the Fund is what he proposed that you should be
21 entitled to.

22 I'm assuming, as I did then, I assume now

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1 that you don't agree with that. But you don't even
2 agree with the factual premise that that represents
3 the percentage of the funds attributable to Public TV.

4 MR. HESTER: Well, I don't, I'm not sure,
5 in all candor, I'm not sure I'm debating that. It's
6 hard to figure it out. But there's some number, you
7 know, at some level that is, and the panel, I think,
8 had evidence in the last case that there was a
9 bracketed range.

10 And I think the 2.1 number, I don't know
11 whether it was the high or the low end of the range.
12 It may have been the high end of the range, in terms
13 of the, what was generated.

14 JUDGE VON KANN: Mr. Garrett, would you
15 wish to shed some light on the subject or bring it up,
16 which ever the case.

17 MR. GARRETT: I don't want to prolong the
18 debate, I mean it's obviously something that we will
19 discuss throughout the course of the proceedings and
20 argue in our post-hearing briefs.

21 But this issue of whether you can
22 attribute certain amounts to particular categories has

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1 come up not only with respect to Public Television,
2 but also with respect to the Canadians.

3 And in our view, the last CARP took rather
4 conflicting approaches to dealing with the Public
5 Television Claimants and the Canadian Claimants on
6 this very point here.

7 And, as I say, that will be the source of
8 further discussion here throughout the proceeding. I
9 think that when you referred to Mr. Trautman what he
10 was saying is, is that in the Board Survey, they have
11 a 2.9 percent number.

12 And that has nothing to do with the amount
13 of the funds that are attributable.

14 JUDGE YOUNG: Oh, I heard that
15 differently. I thought what Mr. Trautman was saying
16 is that in response to Mr. Hester who was questioning
17 his exclusion of certain PBS signals, I thought he was
18 saying the way you deal with this is sort of give them
19 the same percentage as they give the total Fund.

20 MR. GARRETT: I think, Judge, I don't
21 think he said that. For those systems that were PBS
22 only --

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1 JUDGE YOUNG: Right.

2 MR. GARRETT: -- that they carried
3 something that may have been in the '92 -- their total
4 royalty fees were approximately two percent of the
5 total royalty fund.

6 JUDGE YOUNG: Is it PBS only?

7 MR. GARRETT: The PBS only systems. In
8 other words, if you look at the royalty that those,
9 you know, 80 or 90 or whatever it was, cable systems
10 paid.

11 And as the numerator, with the denominator
12 being the total royalty fund, it comes out to another
13 two percent. But that was a different number than the
14 Board Survey number, which was the 2.9 percent.

15 And it is coincidental they're both in the
16 two percent range, but they were two different
17 concepts.

18 JUDGE YOUNG: And is that the same number
19 as this 2.1 percent, referenced in Dr. Hazlet's
20 testimony?

21 MR. GARRETT: No, no, no. That would be
22 too easy. No.

1 MR. SATTERFIELD: If I may, there is
2 carriage of royalty value in the signal products in
3 the case this year, it's in the exhibits that one of
4 our witnesses, Mr. Bennett, so yes, as Mr. Garrett
5 says, the proceeding goes on this issue will be
6 discussed.

7 And in the last proceeding it is actually
8 the Canadian claimants that put in, the royalty data
9 would be calculated to the maximum for a particular
10 city for a given cable system. There was evidence put
11 into the record in the last proceeding that the panel
12 chose to make its awards using different methodology
13 of television --.

14 JUDGE YOUNG: Well, let me just close it
15 out so I make sure I understand it then. Mr. Garrett
16 and Mr. Cooper, then when Mr. Trautman was saying the
17 other day that the Canadians/PBS allocation should be
18 somewhere between three and four percent. Did I hear
19 that correctly?

20 MR. GARRETT: I don't think that we ever
21 said it precisely like that, Judge. I think what we
22 said is that there is this two percent royalties that

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1 were paid by these other cable systems and you would
2 have to find a way to allocate those.

3 I don't think he ever acknowledge that he
4 would give all of that to Public Television. Among
5 other things, that again raises the issue that PBS has
6 raised in the past, as how do you account for systems
7 that carry only one type of signal.

8 Is there some adjustment that is supposed
9 to be made for them? That is a separate issue that
10 was also raised in the proceeding. But I don't think
11 and obviously what I say is irrelevant here, it is
12 whatever the record shows with respect to Mr.
13 Trautman.

14 But I thought he was careful in simply
15 saying that there was another two percent of royalties
16 out there and you would have to find a way to allocate
17 those two and he wasn't necessarily acknowledging that
18 they would all go to PBS.

19 JUDGE VON KANN: Let me, if we can, just
20 take a minute or two more. May 29 and 30, sort of
21 checking in again, my understanding is that the
22 Canadian and Sports Claimants are discussing how to

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1 divvy up those days in some way.

2 And you think that probably it's going to
3 be doable, such that it would be good for us to be
4 sure that we can clear those dates. We're working on
5 that. That's taking some doing on our end.

6 But we didn't want to start bearing down
7 too hard on the other people who have to rearrange
8 their lives if it wasn't going to happen. But it
9 looks like, from your end, it can happen, if I get it
10 right.

11 MR. COOPER: I think that's right. I
12 think we can, we have some little bumps, but I think
13 we can make it work.

14 JUDGE VON KANN: Okay. Well, we're trying
15 on our end to see that we can make it work also. So,
16 hopefully, we'll both be able to tell each other in a
17 day or so, yes, we've got it worked out.

18 MR. COOPER: That's correct. And we will
19 attempt to work out the scheduling types of --

20 JUDGE VON KANN: The effect of which would
21 be, of course, to delete May 28, right. So we would
22 have May 29 and 30 that week, but not May 28.

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1 MR. COOPER: That was our intention.

2 JUDGE VON KANN: Yes. Also, let me ask
3 one other things. I'm looking at the list of things
4 we were going to discuss Wednesday, and we can take
5 one or two short items off the list, so much the
6 better, since we're slightly ahead of the game.

7 We've been talking a little bit more about
8 this issue, what I've been sort of calling the apples
9 and oranges issue. The question of when different
10 Claimants have been saying, requesting a certain
11 percentage allocation in their favor, is there a
12 problem because one of you is talking about percentage
13 of the entire pot and somebody else is talking only
14 about percentage of the pot after the settlements.

15 And I think I'm now hearing back from
16 everybody that all of you, in your statements of
17 claim, in your various submissions telling us what
18 percentage you want, all of you were in fact talking
19 about percentages of the whole fund, of which you seek
20 a share.

21 But that one or two of you may have,
22 within your direct case, witness testimony in which a

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1 witness may have referred, in some way or other, to
2 percentage of a smaller universe. And I guess what
3 we are beginning to wonder is if that is all that
4 we've got, maybe we don't need to do anything about
5 this at all.

6 It just, as long as everybody's claims
7 match up, and we know that you all are claiming
8 certain percentages of the whole. When the witness is
9 on, he can clarify, he or she, what those percentages
10 mean.

11 I was talking in my testimony about a
12 certain percentage of the balance after the x
13 settlement or y settlement. You know, there may be
14 issues, I guess, perhaps, for the cross examiner of
15 that witness about whether all those things compute.

16 But that seems to me to be something we
17 can fairly deal with through direct and cross
18 examination. So we are beginning to wonder on our end
19 whether this issue may be doesn't need any particular
20 retrofits, that we just leave it alone.

21 As long as everybody's claim is parallel,
22 maybe we just let your respective testimony stand as

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1 it is and hope that if any issues come up it will be
2 clarified during the testimony. Mr. Garrett, do you
3 have a view about this?

4 JUDGE GULIN: Well, yeah, just, I don't
5 want to preempt any discussion on this that would be
6 helpful to you. The rules do contemplate that prior
7 to the end of this proceeding, that we all can submit
8 claims at that time, and they can be different than
9 the claims that had been submitted at the outset.

10 And it may be that the panel would want to
11 direct the parties to submit all those claims in a
12 standardized fashion, whichever way is going to be
13 most helpful to you all.

14 But I certainly have no objection to going
15 around the room and talking about what the current
16 claims are and how they relate to each and if that's
17 going to help the panel.

18 But there will be this point in time when
19 we will all be submitting something and it probably
20 does make sense to have it all standardized, certainly
21 then.

22 JUDGE VON KANN: Mr. Stewart.

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1 MR. STEWART: I agree with that approach
2 exactly, and in fact, the rules provide that you can
3 modify your claim, precisely because they ought to
4 accommodate all the evidence that's going to be
5 presented here.

6 And so I think the critical set of
7 statements or claims will actually be in the proposed
8 findings and applied findings. And I think it's
9 useful, very useful to have raised this issue at this
10 stage of the proceedings.

11 Because last tim we didn't really focus on
12 it and that's where the trouble arose at the end of
13 the proceeding. But I don't think that there is going
14 to be any difficulty with our, stating our claims
15 ultimately and making our claims in our proposed
16 findings as a percentage of a whole.

17 Because just as long as we know that's the
18 ground rule, that's fine. And with respect to the
19 witness testimony, when it's quantitative, when
20 they're quantitative studies, yes, absolutely there
21 will be a description of what the universe is and what
22 the share is being measured on.

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1 So I don't think that there is, at least
2 as far as our case is concerned, I don't think that
3 there is any likelihood or confusion about it, but
4 they are different approaches because they are sort of
5 different universes, but it is clear in the testimony
6 what that is.

7 JUDGE YOUNG: What happens, though, when
8 you submit findings of fact and you say we, NAD, think
9 we're entitled to x. And then, based on all the
10 testimony, everybody else is entitled to 100 minus x,
11 and we're going to propose how the rest gets divvied
12 up, or you just worry about yourself.

13 MR. STEWART: No, I think in the past we
14 have, different parties have done it different ways.
15 You know, if you consider that it will be helpful to
16 describe how your claim should jive with everyone
17 else's, you might do that.

18 But I think that proposed timings, unless
19 you direct us otherwise, and it may be that you want
20 to do that, are focuses on our percentage point.

21 JUDGE GULIN: I know I would find that
22 helpful. You know, I'm not suggesting that you should

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1 be advocating a percent for anyone else, but if you
2 just call it x, y and z, just to give us an idea how
3 your rate would fit in with the other rates.

4 JUDGE YOUNG: Well, I have a question,
5 like, as I understand the Joint Sports Claimants,
6 you're seeking an amount that's roughly the equivalent
7 of the board survey?

8 MR. GARRETT: The numbers that we have
9 requested are identical, essentially identical to
10 what's in the board survey.

11 JUDGE YOUNG: And if you look at the board
12 survey there's a heading for NPR, now maybe that's a
13 smaller amount that's surrounding.

14 MR. GARRETT: Yeah, I mean, if we're going
15 to get in that discussion, I think we'd have to
16 concede that we're talking about taking the NPR share
17 off the top, which is the way the settlement with NPR
18 is structured.

19 And then what happens after that is taken
20 off the top. I think, actually, in the '90 to 1992,
21 case, the Librarian gave the award -- maybe I'm wrong
22 on this, but I thought that she may have just taken it

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1 or he may have taken it just off the top there.

2 JUDGE YOUNG: Well, I think you're correct
3 that that was the way it was done to the, somewhat to
4 the regret of the current Copyright Office staff, who
5 wished that it hadn't quite been written that way.

6 And would refer that our report not do
7 that. Let our report speak in terms of --

8 JUDGE VON KANN: I think you said
9 something different.

10 JUDGE YOUNG: Oh, okay.

11 MR. GARRETT: I thought I was referring to
12 the Librarian decision, where the librarian did
13 discuss this point. And, yes, if you look at the
14 final order of the Librarian, the last page, the
15 shares that are awarded there don't refer to NPR.

16 NPR, in that case, had received a certain
17 percentage off the top. And the numbers here are the
18 numbers that are also in Appendix A of Dr. Crandall's
19 testimony.

20 JUDGE VON KANN: But don't those numbers,
21 in effect, add up to 100 percent of what remains after
22 the NPR settlement?

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1 MR. GARRETT: Yes, yes.

2 JUDGE VON KANN: We've been asked not to
3 do it that way. We've been asked to render a report
4 that includes NPR, that includes the devotional
5 claimants and includes the other six of you.

6 And when you add up all of those numbers,
7 it comes to 100 percent.

8 MR. GARRETT: We can certainly do it that
9 way. I think the problem was that the CARP Report was
10 different than the Librarian's Report. The CARP
11 Report did not have the music Claimants a share,
12 because they also had settled out in that last
13 proceeding.

14 And so what they did was to include the
15 music Claimant's share in, when it went up on appeal.
16 Now likewise, I think that the Canadians had settled
17 out that year for 1990, but not '91 and 1992. And so
18 all of the numbers in the Carp Report for 1990,
19 excluded the Canadians as well.

20 And that caused a, it caused them to come
21 up with awards that were then, you know, carried out
22 to the sixth digit.

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1 JUDGE GULIN: But I think what the Chair
2 is saying is that when you submit your final proposal,
3 it should include the devotionals and NPR, their
4 percentages. And then, based upon that, what your
5 percentage should be of 100 percent.

6 And I think what the conversation was a
7 moment ago, with Stewart was, in your particular case,
8 you would also want to indicate how we would figure
9 out music, since music is not part of your analysis.

10 MR. GARRETT: We would certainly want to
11 do that.

12 MR. MAUSE: Yes, to be scrupulous about
13 this, we've gone back and looked and I think we needed
14 to take it last week. We thought the percent we were
15 seeking was of the entire Fund. We're seeking 5.1
16 percent.

17 Looking at the way our methodology works
18 in the history of this, we're basically saying, you
19 know, we've got this 4.5 percent in '90 to 1992, and
20 using that as a benchmark, that can now go from '83
21 through to 1990, 1992.

22 And comparing some numbers we're not

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1 entitled to 5.1 percent. Logically, though, we really
2 didn't get exactly 4.5 percent in '90 to 1992, we got
3 4.5 percent of what was left after NPR.

4 So we probably, logically, should make
5 that same adjustment now and be seeking what would be,
6 I think, about 5.09 percent, instead of 5.1 percent.
7 And I think, in honesty, I would have to say that
8 that's the way our numbers would work.

9 That's what our testimony would support.
10 Although, if you read our claim it says 5.1 percent.

11 JUDGE VON KANN: Then the question arises
12 whether, either you or any of the other parties feel
13 strongly that your testimony or direct case needs to
14 somehow be amended right now, or whether this is
15 something we can deal with later on, as Mr. Garrett
16 suggests, and we put in the final numbers later. I'm
17 not sure -- or through rebuttal.

18 I guess we have been sort of trying to
19 discuss among ourselves, and frankly also consult with
20 the Copyright Office, as to whether, in your
21 situation, for example, whether we should order that
22 U File or revised or amended or corrected, or whatever

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1 it is, direct case that would restate those numbers,
2 slightly.

3 It's not a huge difference, but it's a
4 slight difference. Or, whether, as long as we all
5 know what's going on, we can deal with it later
6 through the final submissions or rebuttal. But I'm
7 not sure we have --

8 JUDGE GULIN: Excuse me. I think in
9 music's case all it would require is an extra page
10 giving the conversion. And that would be it.

11 JUDGE VON KANN: That might be.

12 MR. MAUSE: I think it's a simple, in our
13 case it's a simple mathematical problem. And I believe
14 -- let me double check, but I believe that's the way
15 we do it.

16 JUDGE VON KANN: You all begin May 16,
17 according to the schedule. And I guess it might be
18 good if we had that conversion before you began your
19 case, so that everybody could do it and we could -- I
20 think one concern we have, a little bit, is in the
21 final midnight hours when we're trying to crank out
22 this report and we're looking back at a transcript and

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1 we're seeing different percentages, but they aren't
2 always exactly of the same thing.

3 And we want to try to avoid that problem,
4 if we can. So any help we can get. Yes.

5 MR. MAUSE: Well, on another point, would
6 be what we mentioned, though, that where we have had
7 a couple of the parties indicate that the percentage
8 that they've laid out are net of whatever would be
9 allocated for the user.

10 And the methodologies used by the other
11 parties, finding ways of dividing the time among the
12 program types, different types of programs. Music is
13 not really a program type, it's a program element that
14 runs throughout all programming and that creates a lot
15 of analytical problems.

16 We would like confirmation from the other
17 parties that that in fact is correct for all of their
18 cases, rather than some kind of assertion that music
19 should get nothing. We're not asking people to say
20 music should get x or it should get any particular
21 amount, since when they say 100 percent should be
22 allocated this way and then 100 percent of whatever is

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1 left after an allocation is committed to music.

2 I think that's an important clarification,
3 also.

4 JUDGE VON KANN: Some of you who are
5 veterans, Mr. Garrett and others, in these kinds of
6 situations, has it typically, have parties generally
7 not been asked to propose, we think the record would
8 support the following total allocation and you show it
9 for everybody, music, program suppliers, sports, you
10 know, the works?

11 Or has everybody only been asked to sort
12 of state their own share of the pie that they are
13 seeking and not comment on the others. Have there
14 been situations of which we've asked you, for example,
15 to say give us the proposed total allocation for all
16 six Claimants that you think this record warrants.

17 And the same for Mr. Stewart, and the
18 same, so that each party would, in effect, hand up a
19 proposed, complete list of allocations. Has that not
20 generally been done.

21 MR. GARRETT: Judge von Kann, I don't
22 think it has ever been done at the outset of a

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1 proceeding or during the course of the proceeding. At
2 the conclusion of the proceeding, when the final
3 briefs are submitted and the parties have taken
4 different approaches, some have proposed for all or
5 most all or some have proposed for different parties.

6 But I do not recall any instance where, at
7 the outside of the proceeding, anybody has ever been
8 asked for anything other than what it is they are
9 seeking.

10 JUDGE VON KANN: What do you say to Mr.
11 Mause's point about wanting to know, he wants to know
12 what peoples' view is about where music fits in.

13 MR. GARRETT: He'll find out soon enough.

14 (Laughter.)

15 JUDGE VON KANN: Well, once his witnesses
16 come on, I think he'll understand.

17 I don't mean to be flippant about that. I mean, he
18 has always presented a difficult case and I'm happy to
19 tell him exactly what I think, at any point that the
20 panel is appropriate.

21 (Whispering asides.)

22 JUDGE GULIN: Let me just say one thing,

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1 We certainly understand that the kind of work pressure
2 you're all under, but it certainly would be helpful,
3 I know for me, if in your final proposed findings of
4 fact and conclusions of law, you did allocate a
5 percentage to everyone and give us a rationale,
6 because then, give us your rational because then we
7 can see if there's consistency in the rationale as it
8 is being applied to various groups.

9 I would find that very helpful, but maybe
10 it's something to think about as to whether that's
11 fair to ask you to do that.

12 JUDGE VON KANN: Let's keep that as a
13 topic to discuss. My inclination is, sure, it would
14 be helpful to have it, and you know, we'd, maybe we'd
15 find one of your proposals pretty persuasive and
16 something we could used in our opinion.

17 So, because, you know, this is a zero sum
18 game, so if it comes up out of somebody else's share
19 to go over to yours, we have to be pretty persuaded
20 that you made a good argument for taking it out of
21 that guy's share.

22 So we do, to me it would seem, at least on

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1 first blush, that the more arguments I could hear for
2 how the pie should be sliced up, the more helpful it
3 would be. As opposed to just saying this is what we
4 should get and God knows about the others.

5 That doesn't get us nearly as far. But I
6 don't think we necessarily have to have that right at
7 the beginning and I think we could certainly probably
8 wait until the closed findings, I guess, stage could
9 come in.

10 Well let's, let's all think about this a
11 little. But I think we may be coming around to the
12 view that there's nothing that anybody has to
13 immediately do on this percentage business. Except
14 that if the music Claimants could let us know by the
15 time you begin your case what your new, you know,
16 recomputed percentage is, that would be helpful.

17 Okay, I guess we've gone a little bit --
18 Mr. Olaniran.

19 MR. OLANIRAN: Some minor housekeeping.
20 We have our order of witnesses.

21 JUDGE VON KANN: Oh, great.

22 MR. COOPER: And I, two housekeeping

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1 matters. You had asked for an extra copy of JSC Demo
2 1. And then we had noted Friday that we were going to
3 supplement a couple of additional pages out of the '90
4 to '92 CARP Report that were marked as JSC Demo 7.

5 I have those extra pages here.

6 JUDGE VON KANN: Is this a substitute for
7 the earlier --

8 MR. COOPER: It's a substitute.

9 JUDGE VON KANN: Okay.

10 MR. COOPER: It's a substitute, so I'll
11 give you, here's the one --

12 JUDGE VON KANN: Okay, okay.

13 MR. COOPER: And then four copies of the
14 substitute Demo 7.

15 JUDGE VON KANN: Okay. Okay. Anything
16 else? Okay. I guess if there's nothing else, we're
17 adjourned until 9:30 tomorrow, thank you.

18 (Whereupon, the proceedings went off the
19 record at 5:59 p.m.)

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CERTIFICATE

This is to certify that the foregoing transcript in
the matter of: Hearing: Distribution of the
 1998 and 1999 Cable Royalty Funds

Before: Library of Congress
 Copyright Arbitration Royalty Panel

Date: April 28, 2003

Place: Washington, DC

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to
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